

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA)
vs.)
)
PABLO RANGEL-RUBIO,) CASE NOS.
JUAN RANGEL-RUBIO,) 4:18-CR-00274-LGW-BWC-1
HIGINIO PEREZ-BRAVO,) 4:18-CR-00274-LGW-BWC-2
) 4:18-CR-00274-LGW-BWC-3
)
Defendants.)

MOTIONS HEARING
BEFORE THE HONORABLE BENJAMIN W. CHEESBRO
September 17, 2019; 10:37 a.m.
Savannah, Georgia

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PROCEDINGS

(Call to order at 10:37 a.m.)

3 THE COURT: Good morning, everyone.

4 SPEAKERS: Good morning, Your Honor.

5 THE COURT: Ms. Mixon, please call the case.

6 THE CLERK: Case Number 4:18-CR-274, United States of
7 America versus Pablo Rangel-Rubio, Juan Rangel-Rubio and Higinio
8 Perez-Bravo. Tania Groover, Chris Howard for the Government.
9 Jeffrey Ertel, William Dow Bonds for Defendant Pablo
10 Rangel-Rubio. George Asinc and Mark Olive for Defendant Juan
11 Rangel-Rubio. John Martin, Robert Paul Phillips for Defendant
12 Higinio Perez-Bravo.

13 Your Honor, we have the interpreter Julia Davis for the
14 hearing today.

15 THE COURT: Thank you, Ms. Mixon. Before we get
16 started, would you please swear in Ms. Davis?

17 THE CLERK: Yes, Your Honor.

18 (Interpreter Julia Davis sworn.)

19 INTERPRETER DAVIS: I do.

20 THE CLERK: Thank you. Please state your full name and
21 spell your last name for the record.

22 INTERPRETER DAVIS: Julia Davis, D-a-v-i-s.

23 THE CLERK: Thank you.

24 THE COURT: Ms. Davis, thank you for your service today.
25 And I'm going to ask you to let me know if at any time you need

1 to take a break or if you have trouble hearing or if you need
2 anybody to slow down and speak a little bit more clearly. Can
3 you do that for me, ma'am?

4 INTERPRETER DAVIS: Yes, Your Honor.

5 THE COURT: Thank you. And similarly, I will give that
6 same guidance to everyone who is presenting today. Please be
7 conscientious of the interpreter. Speak slowly and clearly so
8 she can get everything and convey that to defendants.

9 I set this hearing down to take up argument and any
10 evidence in support of defendant's motion Number 128 on the
11 docket, which is a motion to afford defendant due process and
12 effective assistance of counsel as titled and that specifically
13 asks The Court to order the Government to provide more time to
14 consider submissions from the defendants related to the decision
15 to pursue the death penalty. That motion is docketed as
16 Document 128 and then as amended in Document 130.

17 I will also note that there are two motions pending by
18 Defendant Juan Rangel-Rubio and by Defendant Higinio Perez-Bravo
19 that seek to adopt the motions of Defendant Pablo Rangel-Rubio.

20 I will grant those two motions to adopt, both Document
21 140 and 148, and allow those defendants to adopt the motions
22 filed on behalf of Defendant Pablo Rangel-Rubio.

23 As far as the presentations go today, have the
24 defendants coordinated as far as who is going to present
25 argument or any evidence on behalf of the defendants?

1 MR. ERTL: We have, Your Honor, and I think that will be
2 me.

3 THE COURT: It's Mr. Ertl; correct?

4 MR. ERTL: Yes.

5 THE COURT: Can you summarize briefly so I have a sense
6 of what you intend to present here today during the course of
7 the proceeding?

8 MR. ERTL: Yes, Your Honor. We have a series of
9 documents and two live witnesses. The first witness that I
10 would present would be Russell Stetler. I also have
11 declarations from other live witnesses that I would anticipate
12 introducing during their testimony.

13 I also have -- and I've provided copies to the
14 Government or with one exception and I will provide that after
15 the hearing. I have a couple of -- it's called the Spencer
16 report. It's an update of a -- and I have courtesy copies for
17 The Court. May I approach, Your Honor?

18 THE COURT: You may.

19 MR. ERTL: And I will say I will be --

20 THE COURT: If you will provide a copy to Ms. Mixon.

21 (Defendants' Exhibit 3 was marked for
22 identification.)

23 MR. ERTL: This is Defendants' Exhibit Number 3, and I
24 will proffer it as the report of the Committee on Defender
25 Services Judicial Conference of the United States update on the

1 cost and quality of defense representation in federal death
2 penalty cases. It's September 2010 report and it deals with
3 specifically, Your Honor, that -- the reason I introduce it is
4 that it deals with the frequency in which the Attorney General
5 follows the no-death recommendation of the local US Attorney in
6 death penalty cases, and I will point The Court to specifically
7 because it's a rather large document --

8 THE COURT: Mr. Ertl, I will give you just a moment to
9 get into that. Let's cover, though, what the full scope what
10 you're presenting. You mentioned Mr. Stetler as a witness and I
11 think you have a second in-person witness?

12 MR. ERTL: Yes, sir. His name is Richard Singer. He is
13 a court-certified interpreter and that has to do with the
14 discovery, Your Honor, the voluminous discovery and how long it
15 will take us to provide access to our clients of that discovery,
16 sort of the logistical problems that I put out in the brief.
17 Mr. Singer will testify that he has reviewed I think six pages
18 of discovery.

19 I will introduce those, and I would ask, Your Honor,
20 because of the protective order, once those are introduced, that
21 they be put under seal. I think that would be the appropriate
22 thing here, but Mr. Singer was given six pages of discovery that
23 I say are representative samples.

24 He timed the interpretation of each of those documents,
25 and based on those -- on that timing projects how long it would

1 take to read various portions of the discovery, interpret it for
2 the defendants.

3 THE COURT: And what is the nature of Mr. Stetler's
4 testimony?

5 MR. ERTL: Mr. Stetler is -- will be -- he is the
6 national mitigation coordinator. He will talk about the -- what
7 goes into a mitigation investigation, and particularly he will
8 also discuss some of the problems that are -- will be associated
9 with conducting such an investigation in Mexico.

10 THE COURT: All right.

11 (Defendants' Exhibit 6 was marked for
12 identification.)

13 MR. ERTL: I also have one other document, Judge, that I
14 would like to introduce. It is called -- and this will be
15 Defendants' Exhibit Number 6 -- and I'm sorry, I don't have
16 copies for everybody -- I misplaced them -- The Federal Death
17 System, a Statistical Survey. It was done by the United States
18 Department of Justice, and it reviews the death penalty system
19 from 1988 to 2000, and I have one copy for The Court,
20 Defendants' Exhibit Number 6.

21 THE COURT: Have you provided a copy of that to the
22 Government?

23 MR. ERTL: I will provide it. I have talked to Ms.
24 Groover about it, and I will e-mail her a copy of that probably
25 later today.

1 THE COURT: Ms. Groover, are you familiar with this
2 document?

3 MS. GROOVER: The Government is familiar with that, Your
4 Honor.

5 (Defendants' Exhibit 1 was marked for
6 identification.)

7 MR. ERTL: Judge, and I don't know if you want to do
8 this now. I have two declarations, one of which I think the
9 Government is objecting to, but the other one is agreed upon,
10 the admission of, and the first one would be Defendants' Exhibit
11 Number 1, and that is the declaration of Frederick Chen.

12 If I may approach, Your Honor? I've already provided
13 copies of this to the Government. And that is the one that is
14 unobjection-to, Your Honor.

15 Mr. Chen is the computer systems analyst in our office
16 and he -- his declaration talks about the discovery and how much
17 of the discovery there is, how many pages of discovery, how many
18 hours of recorded jail calls, how many hours of recorded witness
19 interviews and the like of that, and that obviously will serve
20 as sort of the basis for Mr. Singer's testimony. Based on Mr.
21 Chen's review of the discovery, Mr. Singer made some
22 projections.

23 THE COURT: Mr. Ertl, just take up this declaration of
24 Mr. Chen first. Is that correct, Ms. Groover, there is no
25 objection to this declaration?

1 MS. GROOVER: Correct, Your Honor.

2 THE COURT: What is the next declaration?

3 (Defendants' Exhibit 5 was marked for
4 identification.)

5 MR. ERTL: The next declaration is of Kevin McNally,
6 Your Honor, and it's -- I will tender right now as Defendants'
7 Exhibit Number 5. This I believe the Government does have an
8 objection to.

9 Mr. McNally is the -- is one of members of the Federal
10 Death Penalty Resource Counsel Project that assists court-
11 appointed lawyers in death penalty cases around the nation.

12 He has been I think associated with it since 1992 and he
13 talks about he relies on the Department of Justice survey that I
14 or document that I have already tendered and he talks about that
15 the frequency in which the Attorney General, in his experience,
16 the frequency in which the Attorney General follows the
17 recommendation of the local US Attorney when there's a no-death
18 recommendation, and that all goes obviously, Judge, to our
19 position that this is -- this presentation is a critical stage
20 in the proceeding. It is a very important one, if we are able
21 to convince the local US Attorney not to -- to send up a no
22 recommendation to the Attorney General, that that is
23 overwhelmingly followed; the chance of that happening are
24 overwhelmingly in our favor. So that -- those are the bases,
25 the reason for those.

1 THE COURT: Mr. Ertl, before you proceed, let me hear
2 from the Government as to the objection to the McNally
3 declaration.

4 MS. GROOVER: Thank you, Your Honor. The Government
5 objects as for the admissibility for lack of foundation and for
6 relevancy.

7 First of all, for lack of accuracy. The current
8 numbers, there are no current numbers in that report, and it's
9 not relevant because the numbers are so old. They are relying
10 on data produced by the Department of Justice to present to the
11 professional inquiry but that data stops at 2010, and
12 furthermore, his declaration is based on Internet news searches,
13 reviewing documents, interviews. There is nothing recent from
14 the Department of Justice and -- because the process is
15 confidential, and in Footnote 3, it's based on what can be
16 extrapolated from knowing just how the protocol works in general
17 and -- but it's nothing specific, and so it's just speculation
18 as to when the Attorney General and the US Attorneys differ, and
19 so we would object with respect to relevancy and lack of
20 foundation.

21 THE COURT: Well, I will overrule the objection to the
22 extent it goes to admissibility of the declaration, but I will
23 consider those arguments made relative to the weight of the
24 statements made by Mr. McNally in the course of this
25 declaration.

1 And Mr. Ertl, is there anything that you would add
2 that's not included in the declaration in terms of argument as
3 to the issues that Ms. Groover just raised regarding the
4 confidential nature of the process, lack of foundation,
5 speculative nature of the testimony contained in the
6 declaration?

7 MR. ERTL: Judge, I think the declaration itself lays
8 out that Mr. McNally and that project is responsible for
9 tracking the cases nationwide, and we understand that it is
10 confidential, so we -- you know, it's not that the US Attorneys
11 are telling them, yes, we've sent up this recommendation or that
12 recommendation, but there's a way in which you can sort of
13 figure it out, and that is by -- if the US Attorney's Office, if
14 we don't like get an audience with the US Attorney's Office, we
15 know that their recommendation is no.

16 If we get an audience with the US Attorney and we don't
17 get called up to DC, we know that the Government's
18 recommendation is no because it's only -- only when the US
19 Attorney or one of the capital case committee members wants to
20 hear from us that we get sent up there, so he can speculate --
21 it's true it's based somewhat on speculation, but there is good
22 solid basis for the speculation. We haven't interview and he
23 hasn't interviewed all the US Attorneys, and I think even if he
24 did, they couldn't disclose what their recommendations are per
25 protocol. It is to be confidential, but it's not wild

1 speculation. It's based on his monitoring of the death penalty
2 cases nationwide.

3 THE COURT: I understand the criticisms and I understand
4 the arguments in support of the declaration made.

5 MR. ERTL: Judge, there is just one housekeeping matter.
6 I would like to introduce Mr. William Lazono and Gabriel
7 Gutierrez from the Mexican Consul who are here in court today.

8 THE COURT: All right, thank you.

9 Ms. Groover, does the Government have any witnesses or
10 evidence it intends to present?

11 MS. GROOVER: Not at this time, Your Honor, only
12 argument at the appropriate time.

13 THE COURT: So I will structure the hearing in this way.
14 I would like for counsel to Defendants to present their
15 witnesses first.

16 Once the witness presentation is complete, I will ask
17 the defendants to present any argument in support of their
18 motion. I will then hear from the Government in response and
19 then give the defendants an opportunity for any rebuttal
20 argument at the close of the hearing.

21 Mr. Ertl, if you would like to proceed with your
22 witnesses.

23 MR. ERTL: Thank you, Your Honor. Call Mr. Russell
24 Stetler.

25

1 RUSSELL STETLER,
2 having been first duly sworn, was examined and testified as
3 follows:

4 THE CLERK: Thank you. You may be seated. Please state
5 your full name, spell your last name for the record, state your
6 occupation and your business address.

7 THE WITNESS: My name is Russell Stetler, R-u-s-s-e-l-l,
8 S-t-e-t-l-e-r. I am a national mitigation coordinator for the
9 federal death penalty projects, and I am based in the office of
10 the federal public defender for the Northern District of
11 California in Oakland, California.

12 THE COURT: Mr. Ertl, before you begin, Mr. Stetler, I
13 will just remind you that we have an interpreter who is
14 assisting with the hearing. I will ask you to be conscientious
15 and speak slowly and clearly so that she can hear you and this
16 proceeding is being taken down by the court reporter as well so
17 be conscientious of her, too.

18 Ms. Davis, I will encourage you to move around the
19 courtroom as you need to in order to position yourself so you
20 can hear everyone fully.

21 You may proceed, Mr. Ertl.

22 MR. ERTL: Thank you.

23 DIRECT EXAMINATION

24 BY MR. ERTL:

25 Q. You talked about you're the mitigation coordinator for the

1 federal death penalty projects. What are the federal death
2 penalty projects?

3 A. They are projects created by the defender services office
4 in Washington that provide assistance to attorneys in federal
5 court under the Criminal Justice Act either in connection with
6 prosecutions under the federal death penalty act or cases on
7 habeas corpus, so there are really two main projects in the
8 rubric of Federal Death Penalty Resource Counsel.

9 Q. What exactly is your -- what exactly are your duties and
10 responsibilities?

11 A. I consult with lawyers who have cases in federal court,
12 capital cases in federal court, on issues relating to
13 mitigation, investigation and presentation of mitigation
14 evidence.

15 Q. Was your -- when was your position created?

16 A. 2005.

17 Q. Pursuant to what?

18 A. An authorization from the defender services committee.

19 Q. Are you familiar with the Spencer report? You've heard me
20 talk about it here in court today.

21 A. Yes, I am.

22 Q. Is your position as mitigation coordinator described in
23 there?

24 A. It's described in the 2010 update.

25 Q. Let me show you what's been previously marked -- may I

1 approach, Your Honor?

2 THE COURT: You may.

3 Q. (By Mr. Ertl) -- as Defendants' Exhibit 3. It's been
4 admitted. Can you tell me, can you tell The Court what that
5 is?

6 A. Yes. This is a report to the committee on defender
7 services of the judicial conference of the United States, an
8 update on the cost and quality of defense representation in
9 federal death penalty cases. It's dated September 2010 and it
10 updates the original 1998 report by Judge Spencer.

11 Q. I would ask you to flip to Pages 111 and 112 of the
12 report. And can you read into the record the description of
13 your position?

14 A. Yes. "In 2004, the defender services committee authorized
15 the position for a national mitigation coordinator in a federal
16 defender office to assist in expanding the availability and
17 quality of mitigation work in death penalty cases in the federal
18 courts. In addition to leveraging his own significant knowledge
19 and skills through case consultation, the national mitigation
20 coordinator has enhanced defense representation and contributed
21 to cost containment efforts by recruiting more mitigation
22 specialists to work on federal capital cases, matching
23 mitigation specialists with counsel and providing expanded
24 training opportunities both for defender staff and for private
25 mitigation specialists who are authorized to work on federal

1 cases. This training enhances the skills and availability of
2 such professionals."

3 Q. Thank you. Before you were the national mitigation
4 coordinator, did you have any other experience or any other
5 positions dealing with death penalty cases?

6 A. Yes.

7 Q. Can you tell us?

8 A. Immediately before taking this position in 2005, I was the
9 director of investigation and mitigation at the New York State
10 capital defender office. That office was created by statute
11 when the death penalty was reenacted in New York state, and it
12 had a mandate to see that indigent defendants facing death
13 penalty prosecutions received effective representation.

14 It provided both direct representation and assistance to
15 lawyers assigned by the courts. Before that, I was a chief
16 investigator at the California appellate project from 1990 to
17 1995, and that office was a non-profit funded by the California
18 Supreme Court and the defender services office to coordinate the
19 representation of the large number of people under sentence of
20 death in California.

21 So it did not do significant direct representation but was
22 a resource to assist the lawyers who were appointed on death
23 penalty appeals and state postconviction and federal habeas
24 corpus, and before that, I began working on death penalty cases
25 in 1980, and from 1980 to 1990, I worked in a private capacity

1 investigating death penalty cases and other homicide cases, but
2 I did about a hundred homicide cases in which a couple of dozen
3 were death penalty cases, and that was just in a private
4 capacity working for public defender offices or for appointed
5 counsel.

6 Q. Are you aware of any training programs that focus on the
7 development of mitigation evidence?

8 A. Yes.

9 Q. Can you tell us about that?

10 A. Yeah. There have been training programs that focused on
11 mitigation almost as long as the modern death penalty has been
12 in effect. You know, I worked in California in 1980 to 1985.
13 There was an annual death penalty conference that was attended
14 by hundreds of people and it always had significant
15 presentations on investigation and prosecution of mitigation
16 evidence.

17 Nationally, the -- since most of these cases in state
18 court were handled by public defender offices, a large national
19 organization of public defenders, which is called the National
20 Legal Aid Defender Association, began holding national death
21 penalty training programs, and those programs were divided in
22 two segments. One focused on mitigation and the other on
23 litigation.

24 And in the 1990's, the National Association of Criminal
25 Defense Lawyers, which is the largest national organization of

1 the private defense bar, also began a national training program
2 called Making the Case for Life, which was very much a
3 mitigation-focused program and continues to today.

4 In addition, the NAACP legal defense fund held an annual
5 capital punishment project throughout this period. That
6 organization had been involved in much of the early litigation
7 of the death penalty and they had a conference which invited
8 people from all the jurisdictions that had active death penalty
9 cases to sort of share their practice experiences and wisdom.

10 Q. Are there current programs that are -- are those in the
11 past or are they currently active?

12 A. They are currently active and there are other additional
13 programs now.

14 Q. Have you attended continuing legal education programs
15 dealing with mitigation investigation?

16 A. Yes.

17 Q. And how many times would you think?

18 A. I don't have a precise number, but it's over 400 times.

19 Q. Have you ever served as faculty at one of these trainings?

20 A. Yes, again, more than 500 continuing legal education
21 programs.

22 Q. Were those national, local, regional?

23 A. All of those.

24 Q. How many jurisdictions have you been invited to give CLE's
25 in?

1 A. I think the easiest way to answer that is say almost all
2 of the jurisdictions which now have the death penalty with three
3 exceptions, Montana, Nebraska and South Dakota. They have a
4 very tiny death row. But all other the jurisdictions that have
5 state death penalties and, of course, about a hundred times I've
6 served on faculty in connection with cases in federal court.

7 Q. How about federal death penalty training programs?

8 A. Yes.

9 MR. ERTL: Did you get that, I'm sorry? I just mumbled.

10 Q. (By Mr. Ertl) How many times would you estimate you've
11 participated in federal death penalty trainings?

12 A. About a hundred.

13 Q. Have you --

14 A. Excuse me, that's a hundred federal programs. That's not
15 all trial level programs.

16 Q. Okay, and that's --

17 A. Just to clarify.

18 Q. -- always dealing with mitigation?

19 A. Yes, but that's both trial and habeas corpus.

20 Q. Have you assisted in planning trainings?

21 A. Yes.

22 Q. Can you tell us a little bit about that?

23 A. At various times, I have served on planning committees for
24 those national conferences that I mentioned. I was the cochair
25 of the California capital case defense seminar for six years.

1 That seminar has expanded to the point where it's attended by
2 over 1200 people, has a number of plenary sessions and 60 or 70
3 workshops with a big track on mitigation, and in my current
4 capacity, I have assisted one of the federal death penalty
5 projects in a substantive mitigation program that has been held
6 annually since 2004.

7 I took my job in 2005, so from that point on, I was
8 actively involved with that project in the substantive
9 mitigation training. It's a four-day program that is devoted
10 exclusively to mitigation issues and then I helped design a
11 mitigation skills program which was held for the first time in
12 2012 and has now been held ten times all together.

13 It's being held twice a year and that's designed to teach
14 skills, standards that relate to mitigation investigation and
15 presentation and it's an interactive program where people use a
16 case hypothetical to brainstorm issues, analyze information from
17 life history, records, and get on their feet and conduct
18 interviews with actors playing the roles of clients, family
19 members and so forth.

20 Q. And the people that attend that, are they lawyers,
21 mitigation investigators or a combination of both?

22 A. Combination of both, and again, part of the goal of that
23 program is to increase the capacity, specifically to increase
24 the capacity in federal court.

25 Q. And did you say that's been conducted ten times since

1 2012?

2 A. That's correct.

3 Q. And is that again a four-day program?

4 A. Yes.

5 Q. Have you taught at -- you mentioned that you were the
6 cochair of the California death penalty training. Have you
7 taught at what's commonly known as death penalty colleges?

8 A. Yes.

9 Q. Can you tell us first of all what a death penalty college
10 is.

11 A. Well, they are a little different. Instead of just having
12 talking heads giving lectures, the death penalty colleges and
13 other bring-your-own-case programs invite teams to come and
14 brainstorm their cases with experienced faculty and with peer
15 teams.

16 So it's a combination of lectures followed by small group
17 discussion, and we've had death penalty college at Santa Clara
18 University Law School in California since roughly 1992.

19 There was another one at DePaul College of the Law in
20 Chicago and then following in 2005 President Bush in his State
21 of the Union address announced that he was going to secure
22 funding for training people in death penalty defense, and a
23 number of organizations formed a consortium to organize programs
24 with that funding and those programs were held in multiple
25 locations around the country, all focused again on an

1 interactive model where people would come and talk about the
2 issues in their cases, brainstorm the issues with experts and
3 with peer defense teams from other places and, you know, one
4 hopes come out with a -- with a better sense of what to do in
5 their individual cases.

6 Q. In the trainings that you've conducted and designed, do
7 you focus any of the training on interviewing techniques?

8 A. Yes.

9 Q. What other skills are involved in training somebody in
10 mitigation?

11 A. Well, there are two main components of mitigation
12 investigation. One is gathering and analyzing documentary
13 information about clients and their families. It's a
14 multi-generational investigation so we try to obtain records,
15 medical records, school records, work records and so forth for
16 clients, their parents and a generation beyond that when we can,
17 and that provides a sort of skeletal architecture with hard
18 dates and specific information that's generated by the myriad
19 institutions that shape our lives, and then in addition to the
20 hard information from those records, the other main skill
21 involves interviewing.

22 Mitigation interviews are often facing what we call
23 barriers to disclosure. We're asking people about what happened
24 in their family when a client was growing up. Often we're
25 asking embarrassing, invasive questions about traumatic

1 experiences that people may have had or we're asking information
2 about mental health issues that may run in a family, and we all
3 as ordinary human beings have resistance to sharing that kind of
4 information with strangers, and so what we train in our programs
5 is ways to overcome those barriers to disclosure through
6 patience and building rapport and trust, and in addition to
7 those ordinary kind of universal barriers that we all have,
8 there are additional barriers based on how we identify
9 ourselves, our badges of social identity, whether it's politics
10 or race or ethnicity or education, religion.

11 All of those things may be further differences between
12 ourselves and the clients and their families, so we advocate for
13 diverse teams so that we can bridge some of these gaps, but we
14 also train everyone to recognize how those differences create
15 barriers and how patience and trust-building, rapport-building
16 can overcome the barriers to disclosure.

17 Q. I think you talked about part of your job is consulting
18 with people in federal death penalty cases?

19 A. Yes.

20 Q. You do that as part of your mandate now?

21 A. Yes.

22 Q. Do you also consult with people who have state death
23 penalty cases?

24 A. Occasionally, I will consult of a state case pro bono, but
25 my official duties are on federal cases only. However, if

1 someone is sentenced to death in state court and that case
2 reaches federal court in habeas corpus, that is within the
3 definition of my job.

4 Q. Let's go before 2005 when you took on the national
5 coordinator job. Did you consult with people in -- who had
6 state death penalty cases?

7 A. Yes, absolutely.

8 Q. Have you published anything related to, first of all, the
9 death penalty and secondly to mitigation?

10 A. Yes. My publications are almost exclusively about
11 mitigation. I've published 10 law review articles, several book
12 chapters and a number of articles in defense bar magazines.

13 Q. Have you had a role in drafting any death penalty -- well,
14 are there death penalty manuals out there?

15 A. Yes, there have been death penalty manuals for a long
16 time, generally generated in individual states. I helped to
17 shape the California manual's discussion of mitigation issues
18 beginning in the 1990's. We created a whole separate volume of
19 the California trial manual on mitigation, and then as I
20 mentioned before, I was at the New York capital defender office
21 from 1995 to 2005 and helped to draft the section on mitigation
22 in the New York manual as well.

23 Q. Can you explain what is the manual, what's it intended to
24 do? What is --

25 A. Well, it's just to give trial lawyers a resource for

1 handling their first case, keep them current on the law and
2 effective practice in death penalty cases, so it's not something
3 which is published once and frozen in time. All of these
4 manuals evolve over time.

5 The first California manual was published in the early
6 1980's and in hard copy only. Now it's published on a digital
7 form and a new edition comes out every year and is distributed
8 at the capital case defense seminar that I mentioned.

9 Q. We've talked a lot about what you've published and the
10 training you've done. Have you personally conducted mitigation
11 investigations?

12 A. Yes.

13 Q. Could you estimate in how many cases?

14 A. Hundreds of cases. I don't have a precise number. I
15 mean, in my individual capacity, couple of dozen cases in the
16 1980's, and then as I moved into institutional offices, there
17 was a large volume of cases, and again, California had the
18 largest death row in the country even in the early 1990's, and
19 so our office worked on scores of cases in that timeframe that I
20 was there in 1990 and '95, and then when I was in New York 1995
21 to 2005 our office had effectively first refusal rights on
22 cases.

23 We took as many cases as we could on direct
24 representation. We were notified by statute when somebody was
25 arrested in a potential death penalty case. And we jumped into

1 those cases immediately. If there was some reason why we could
2 not take the case because of our own work load being too
3 stretched, we still provided assistance to private lawyers who
4 had those cases, and in that ten-year timeframe, there were over
5 800 cases that were death-eligible, and we were actively
6 involved as early as possible in investigating, mitigation, also
7 investigating culpability issues so that we could meet with
8 prosecutors and try to persuade them not to go forward seeking
9 the death penalty, and so the number of cases where a formal
10 notice seeking the death penalty in those New York cases was a
11 very tiny fraction of the 800, it was, you know, 50 to 60 cases
12 I believe, and of that, the cases which continued all the way
13 through to a penalty trial was much, much smaller. I think we
14 had 15 death penalty trials in that timeframe.

15 Q. Have you ever been qualified as an expert in the
16 courtroom?

17 A. Yes.

18 Q. Do you know, can you give me an estimate of how many times
19 and possibly where?

20 A. Yes, it's over 30 times, and it's been in state and
21 federal courts. Alabama, Arkansas, Arizona, California,
22 Colorado, Idaho, Iowa, Louisiana, Missouri, Nevada,
23 Pennsylvania, South Carolina, Tennessee, Texas and Wyoming.

24 Q. I noticed that was alphabetical.

25 A. I try. It's the only way I can remember things.

1 Q. And what type of proceedings -- first of all, what are you
2 a testifying expert about?

3 A. About mitigation in death penalty cases and it's both
4 pretrial cases and postconviction or habeas corpus cases, so
5 sometimes it's a pretrial proceeding about funding or whether
6 somebody can get a fair trial when -- on a resentencing
7 proceeding after lots of mitigation evidence has been lost and
8 in postconviction proceedings mostly on what was the standard of
9 care at the time of the original trial and whether trial counsel
10 met that standard in their performance.

11 Q. Has there ever been an instance when a court did not --
12 when you were tendered as an expert and a court did not qualify
13 you?

14 A. No.

15 Q. If you are aware, has your testimony been cited in court
16 opinions or by courts?

17 A. Yes, several times.

18 Q. Can you give us some examples?

19 A. Yeah. In federal district courts in a habeas Section 2255
20 proceeding that is arising out of a federal death sentence in
21 *United States versus Johnson*, I was cited by Judge Bennett in
22 the Northern District of Iowa.

23 In *State versus Wessinger* in the Middle District of
24 Louisiana, Judge Brady cited my testimony in a 2254 federal
25 habeas corpus case arising out of a state death judgment.

1 Similarly in the district of Wyoming, Judge Allen Johnson
2 cited my testimony in the case of *Dale Eaton*, E-a-t-o-n, and
3 then there are a couple of cases in State Court, Judge John
4 Cruzot, C-r-u-z-o-t, in Dallas, Texas cited my testimony
5 extensively in the *Jonathan Reed* case, *State v. Reed*. Judge
6 Cruzot is no longer on the bench, but he is now the district
7 attorney of Dallas County. And in a federal habeas case that
8 was sent back to state court in Marshall County, Nevada,
9 Judge -- I think it's Polaha, P-o-l-a-h-a cited my testimony in
10 the *Gutierrez* case, G-u-t-i-e-r-r-e-z.

11 MR. ERTL: May I approach, Your Honor?

12 THE COURT: You may.

13 (Defendants' Exhibit 4 was marked for
14 identification.)

15 Q. (By Mr. Ertl) I'm showing you what has previously been
16 marked as Defendants' Exhibit Number 4. Do you recognize that
17 document?

18 A. I do.

19 Q. What is it?

20 A. It's the declaration I prepared for this proceeding.

21 Q. Does that declaration accurately summarize your background
22 and experience?

23 A. Yes.

24 MR. ERTL: Judge, I would offer Mr. Stetler as an expert
25 in the area of mitigation investigation.

1 THE COURT: You're tendered as an expert under Rule 10.

2 MR. ERTL: I'm sorry, I tender -- I move for the
3 admission of Defendants' Exhibit Number 4.

4 THE COURT: Any objection to this exhibit?

5 MS. GROOVER: No objection, Your Honor.

6 THE COURT: It's admitted.

7 MR. ERTL: Then I tender Mr. Stetler as an expert.

8 THE COURT: I will note that it's not clear the rules of
9 evidence are applied to this hearing under 1101(d) so his
10 designation as an expert may be inconsequential. What's the
11 Government's position?

12 MS. GROOVER: We have no objection to qualifying him as
13 an expert.

14 THE COURT: I will accept him as an expert though that
15 designation may not be consequential here, but in any case...

16 MR. ERTL: Thank you, Your Honor:

17 Q. (By Mr. Ertl) Let me talk a little bit about your
18 personal experiences in conducting mitigation. You talked a
19 little bit before that you've conducted dozens if not hundreds
20 of mitigation investigations. So you've personally -- and I
21 will call them domestic mitigation investigations -- you've
22 personally conducted those?

23 A. Yes.

24 Q. And have you also supervised others who are conducting
25 domestic mitigation investigations?

1 A. Yes. From 1990 to '95 at the California appellate project
2 and from 1995 to 2005 at the capital defender office in New
3 York, I was doing some on-the-ground investigation but mainly
4 supervising others who were conducting the investigations.

5 Q. And were those -- were you supervising people in your own
6 office who were conducting their mitigation investigations?

7 A. Yes and to some extent also coordinating with outside
8 mitigation specialists who were working with the private --
9 privately-retained -- private court-appointed lawyers.

10 Q. Would you have an estimate on how many times you consulted
11 or supervised domestic mitigation investigations?

12 A. Again, it's hundreds. I don't have a precise number, but
13 we were heavily involved in a huge fraction of the cases in New
14 York.

15 Q. Would it be fair to say that the mitigation investigations
16 that you supervised were over multiple jurisdictions or was it
17 just within New York and California?

18 A. Well, what I supervised in those periods, yes, was limited
19 to those two jurisdictions but statewide in both California and
20 New York and then more recently since 2005 I have consulted with
21 people. I have not been their direct supervisor but I have
22 consulted on federal cases all over the country.

23 Q. In contrast to domestic mitigation investigations, have
24 you conducted international, I will call it international or
25 foreign mitigation investigations?

1 A. Yes.

2 Q. Can you give me an estimate about how many times?

3 A. I think roughly half a dozen times where I worked outside
4 the country myself and that would be in some places close to
5 home, Canada, Puerto Rico and the Virgin Islands. I know Puerto
6 Rico and Virgin Island are not really foreign countries but they
7 are very different from conducting investigation stateside, and
8 then in Germany, Nigeria and Honduras.

9 I also supervised people in those offices that I mentioned
10 who investigated in Colombia, Dominican Republic, Jamaica,
11 Mexico, Peru and Thailand. Maybe more but that's my frail
12 memory.

13 Q. Maybe I should have asked this question earlier. What is
14 mitigation?

15 A. Well, mitigation is the evidence which can persuade a
16 decision maker, whether it's a prosecutor or a reviewing judge
17 or an individual juror, not to impose the death penalty, so it
18 is evidence that humanizes, which identifies human frailties and
19 disadvantages.

20 It may help to explain why a capital offense happened
21 although there is no requirement of explanation. Some things
22 are inherently mitigating, but it's any of that evidence which
23 can inspire compassion and mercy by virtue of the way that it
24 has humanized the capital accused.

25 Q. You talked a little bit before about your trainings and

1 you were testifying as an expert on the standard of care. Can
2 you inform The Court what is the standard of care when it comes
3 to conducting mitigation investigations and where do you -- how
4 do you come to -- how do you come to that standard of care?

5 A. Well, briefly, it's beginning the mitigation investigation
6 as soon as possible. In New York, we had what we called a
7 beachhead protocol, so at the very moment someone was charged
8 with a potential capital offense, someone went to meet the
9 client at the jail and someone else went to meet the client's
10 family to begin the process of explaining to them the
11 seriousness of the allegations.

12 And the investigation is, as I said before, is always on
13 two tracks. You are seeking to collect all of those
14 biographical records for the client and family members and other
15 people who were in the household, all of the records that kind
16 of document significant events in a client's life and then
17 beginning that painstaking process of building rapport and trust
18 with family members so that they become comfortable in sharing
19 rather intimate details of what went on in a family, if there
20 has been familial domestic violence, if there are family
21 histories of mental illness, for example, if there has been, you
22 know, brutality in the home in childhood, other forms of
23 deprivation, there's maternal exposure to alcohol during
24 pregnancy. Those are things that people don't automatically
25 want to reveal so you build trust, begin to elicit information

1 about those sorts of issues and in addition you use your records
2 to get people to open up.

3 Sometimes when the records tell you things that the family
4 has not disclosed, they realize at that point there is no point
5 in trying to keep it a secret any longer and they become more
6 forthcoming. The records are very valuable for preparing
7 witnesses to testify. They also allow us to conduct more
8 thorough interviews and, you know, the interviews are not a
9 one-shot event. Building the trust and rapport takes time.

10 Gathering the records takes time even in this country
11 where records tend to be better centralized. Often you will
12 send out a request for records with an authorization from the
13 client and it takes weeks, sometimes months, to get a full
14 response. Sometimes you have to go visit the institutions in
15 person, and in the case of witnesses, you know, our sort of
16 mantra in this area is multiple in-person one-on-one
17 face-to-face interviews for the same reason we have face-to-face
18 testimony in court. We want to see the people that we're
19 talking with.

20 We want them to see us and understand who we are and
21 understand the, you know, complicated world of death penalty
22 litigation because there's no real corresponding feature to
23 mitigation in ordinary non-capital proceedings.

24 Q. You said one on one. What's important about that? Why
25 wouldn't you want to bring like four or five family members into

1 the living room and talk to them all at once?

2 A. Well, that's fine for meeting and greeting people, but you
3 want to talk to people individually so that they can open up and
4 share things that they may not want to discuss in front of the
5 other people.

6 If you have a household in which there was serious
7 physical violence in the home, if the perpetrator of that
8 violence is still in the family, other family members aren't
9 going to want to discuss it in front of that person.

10 So you want to do it -- you want to conduct your
11 interviews in the home because that's going to provide the best
12 memories of the client but you want to do it individually so
13 that people are not tailoring what they tell you because of the
14 presence of other people and you want them to feel that what
15 they are telling you is confidential to the extent you're not
16 sharing it with other people; we may need it for presentation at
17 a later point, but it's -- and it's going to be shared with the
18 defense team, but we're not gossiping.

19 We're not talking to other relatives about what we're
20 learning from individuals. We are just harvesting that
21 information as thoroughly as we can and it takes time and
22 patience.

23 Q. I think I got you a little off track. I think you were
24 talking about records gathering as one aspect of the standard of
25 care. What is the -- if there is more that you wanted to

1 deliver, if not what is the second?

2 A. The second is the interviewing and, of course, the
3 investigation starts with the client. You will obviously sit
4 down with the client and learn as much as possible from the
5 client's own memory about who are the significant people, who
6 can give you more information and it sorts of radiates outward.

7 It's, you know, we call it a social history investigation,
8 and so it starts with a client, radiates outward to other
9 members of the family and then the community in which he grew up
10 and you will use your records oftentimes to identify teachers,
11 neighbors, other people who knew the client in his developmental
12 years, so you're not entirely dependent on people who were as
13 closely associated as family members so it's an interactive
14 process between the gathering and analyzing the records and
15 identifying potential witnesses and conducting those interviews.

16 INTERPRETER DAVIS: Excuse me, Your Honor, the
17 interpreters would like to switch.

18 THE COURT: Yes, ma'am. I understand we have Ms.
19 Gonzales here as well as backup for our interpreter. Mr. Ertl,
20 I ask you to pause for just a moment. Ms. Mixon, would you
21 please swear in Ms. Gonzales at this time?

22 THE CLERK: Yes, Your Honor.

23 (Interpreter Gonzales sworn.)

24 INTERPRETER GONZALES: Yes, I swear.

25 Thank you, Your Honor.

1 THE CLERK: Please state your full name and spell your
2 last name for the record.

3 INTERPRETER GONZALES: Michelle Gonzales, 08103.

4 THE COURT: Ms. Gonzales, ready to proceed.

5 INTERPRETER GONZALES: I'm sorry, Your Honor, the
6 interpreter is used to saying her credentials. G-o-n-z-a-l-e-s.

7 Q. (By Mr. Ertl) You just used the term "developmental
8 years." Can you tell The Court what you mean by that. What
9 are developmental years and why are they important?

10 A. Well, we are interested in what shaped the individual
11 growing up, what frailties he may have as a result of his life
12 circumstances during childhood.

13 One of the Supreme Court cases that gave us guidance in
14 this area, the *Eddings* case, *Eddings v. Oklahoma*, said youth is
15 not just a chronological fact. It's a time of life when we are
16 vulnerable to outside influences, whether it's peer pressure to
17 do things or whether it's the circumstances in the home.

18 And, you know, that's an old case from the early 1980's,
19 and I think that has focused a lot of the mitigation
20 investigation to what happened to individuals when they were
21 growing up and, of course, jumping ahead to more recent cases
22 such as the *Atkins versus Virginia* case that created an
23 exemption for people with intellectual disability, two prongs of
24 the test for intellectual disability are something that occurred
25 in the developmental years and adaptive functioning, so we're

1 looking for how the individual was able to develop skills in
2 childhood, what negative influences he was exposed to and
3 actually doesn't even start with birth.

4 It goes back to what's in the DNA, what was encoded in
5 terms of familial genetic loading or genetic vulnerabilities to
6 mental conditions including cognitive conditions and was there
7 exposure to alcohol or trauma when the individual was in the
8 womb and then what happened in the early developmental period,
9 was an individual exposed to neurotoxins or head injuries that
10 could have affected brain development because brain development
11 begins in utero and remains a very significant issue through
12 particularly in early childhood but throughout childhood, and
13 brain damage is something that has been a significant part of
14 mitigation for as long as the modern death penalty has had
15 sentencing proceedings, so we've always looked for brain damage
16 because if someone has a brain that isn't functioning properly,
17 there are issues of impulse control and other mental conditions
18 that may be highly relevant to whether a juror will exercise
19 that mercy function.

20 Q. You mentioned that -- you used the term "neurotoxin."
21 What is neurotoxin?

22 A. Something that harms the brain.

23 Q. Could those -- you mentioned exposure to alcohol in utero.
24 Would the alcohol in that situation be a neurotoxin?

25 A. Yes, absolutely.

1 Q. But can neurotoxins also be part of the environment?

2 A. Yes, absolutely.

3 Q. So --

4 A. If you have someone who grew up in an agricultural
5 community where pesticides were sprayed, for example, children
6 exposed to that pesticide have a potential neurotoxin exposure.
7 You know, whether you have clean drinking water, things that
8 we're all concerned about with our own children and
9 grandchildren, are precisely around this issue.

10 Q. So part of a mitigation investigation is actually looking
11 into the environment that the defendant and the client grew up?

12 A. Yes.

13 Q. You mentioned a couple of times a multi-generational
14 investigation. Can you explain what that is?

15 A. Yes. I think I mentioned that there are genetic
16 vulnerabilities to mental illness and to mental impairments that
17 pass from one generation to the next. You know, when you are as
18 old as I am and you go for your annual checkup, your doctor is
19 absolutely obsessed with what's running in your family, what did
20 your parents and grandparents die of.

21 So we've kind of understood in the medical area that there
22 are vulnerabilities that we inherit from our parents and
23 grandparents, and more recently -- I think this is really only
24 in the last 30 or 40 years -- there's been a recognition that
25 there are similar genetic vulnerabilities to mental disorders

1 and it doesn't mean if your mother suffered from schizophrenia
2 that you will also have that disorder any more than your father
3 dying from a heart attack means you will die from a heart
4 attack. It just means that there is this genetic loading, this
5 genetic predisposition or vulnerability and it's something that
6 mental health experts will want to know about, and they are
7 frequently involved in part of the presentation of mitigation.

8 Q. What is the mitigation investigation? What is the role of
9 that in a mental health workup, if you will?

10 A. Well, I think there are a couple of ways of looking at it.
11 One is you want to use your mitigation investigation to identify
12 what kind of expert you need. For example, if your life history
13 investigation shows that there have been repeated head injuries,
14 for example, then you're probably going to get mental health
15 experts who are experts on the brain and the impact of these
16 injuries, whether it's a neuropsychologist or neurologist, a
17 neuropsychiatrist, but helping to identify what kind of experts
18 you need based on what you're finding in the mitigation
19 investigation.

20 If you have indications from your interviews of
21 developmental delays, potential deficits in adaptive
22 functioning, then maybe your mental health experts are going to
23 be focused entirely on intellectual disability issues, and that
24 would mean not only a neuropsychologist to do testing of
25 intellectual functioning but also people who are specialized in

1 examining and analyzing an individual's behavior developmental
2 milestones and so forth.

3 If someone grew up in a very violent environment, whether
4 it's domestic violence or, you know, completely safe home but a
5 violent neighborhood, where you had to negotiate how to get to
6 school because of gang violence, then you may want a trauma
7 expert, and so you don't just randomly choose a mental health
8 expert but you try to choose experts based on what you have
9 learned in the mitigation investigation and I said there were
10 two parts to it.

11 The other part is not just choosing the expert but
12 deciding what questions they will address, so it's not just a
13 one-size-fits-all evaluation. You know, it's not like an
14 ordinary evaluation for competency or sanity, criminal
15 responsibility. Mitigation embraces things that happened over
16 the entire life span of the individual, so you want to frame the
17 questions that the expert is going to address based on what you
18 have learned in the mitigation investigation.

19 Q. So it sounds to me -- correct me if I'm wrong -- that
20 mitigation investigation should be almost complete before a
21 decision on a mental health -- whether mental health evaluation
22 is necessary, and, Two, what type of expert to employ?

23 A. Substantially underway.

24 MS. GROOVER: Your Honor, I would like to object to the
25 continued questioning about the prospective -- specifics of the

1 mitigation. The Government has no objection that this is an
2 expert as to the standard of care required, but what is the
3 relevancy as to whether The Court has additional time to grant
4 additional time in this proceeding?

5 THE COURT: Mr. Ertl, response.

6 MR. ERTL: Judge, I think this goes to what -- I think
7 that is a separate issue, whether this Court has the authority
8 to grant that time and, of course, our position is it does, but
9 this informs The Court on how much time. Should The Court
10 decide that you do have the authority, this witness is going to
11 inform how much time is going to be reasonably necessary for us
12 to conduct mitigation investigation, and part of that
13 investigation in this instance would possibly be presenting the
14 Government with evidence that the client suffers from some
15 mental illness or defect, so this all goes as to how much time
16 should The Court find it has the authority.

17 THE COURT: I understand the objection. I will observe
18 that Mr. Stetler's testimony has been that the mitigation
19 investigation process is complex, multi-faceted, involving a
20 number of different concerns and he's laid a lot of foundation.

21 I've yet to hear any testimony specific to this case why
22 it would connect some of those concepts, and I understand why
23 you want to go into that, but as to the issues of the relevance
24 to inquiry right now, I understand that part of the defendant's
25 motion is if The Court does have authority, then it should order

1 an extension and that it intends to present some suggested
2 extension as well, so it is relevant at this time, but I
3 encourage Mr. Ertl to get to the specifics of this case and
4 exactly that.

5 MR. ERTL: Judge, I will contrast domestic investigation
6 with international for Mexican, specifically to Mexico in just a
7 few minutes.

8 Q. (By Mr. Ertl) Okay, so...

9 Are you personally familiar with the special complexities
10 that are involved in conducting mitigation investigation of
11 foreign nationals?

12 A. I have some experience in that area, yes, both from
13 personal experience and from supervising people who have had to
14 conduct investigations abroad.

15 Q. I know we talked about jurisdiction of the countries that
16 you investigated in or supervised before so I'm not going to go
17 into that. Have you personally conducted a mitigation
18 investigation in Mexico?

19 A. No.

20 Q. Have you -- why is that?

21 A. Well, I am not ethnoculturally competent to conduct an
22 investigation in Mexico. You need people who are bilingual and
23 people who know more about Mexican culture than I know.

24 So when I worked in the capital defender office in New
25 York, we had a few cases involving Mexican nationals, and we

1 sent people from our staff -- I think it was entirely from our
2 staff -- who were bilingual and did have that kind of training,
3 and, you know, I definitely consulted with them when they
4 returned.

5 In some cases, we talked on the phone while they were
6 there, so I understood the problems that they were facing and I
7 helped shape what was ultimately presented in mitigation, in the
8 proffers that we did subsequently, but it was other people who
9 conducted the investigation on the ground.

10 Q. In some of the trainings, in any of the trainings that
11 you've been either -- that you've either developed or taught in,
12 is there a training about conducting investigations of foreign
13 nationals?

14 A. Yes. There are enough cases involving foreign nationals
15 that it has become a regular component of capital defense
16 mitigation training to have specific sessions on the problems of
17 investigating abroad.

18 Q. What is the general view of mitigation specialists who are
19 investigating foreign national cases?

20 A. That they are the hardest cases to investigate, most
21 arduous.

22 Q. Why is that?

23 A. Things that we take for granted in this country are just
24 completely different in foreign countries, particularly less
25 developed countries, third-world countries. Start with the most

1 basic concerns, physical security, safety. You know, many of
2 our clients in this country come from neighborhoods that may be
3 crime-ridden, gang-infested, but we know in advance what those
4 neighborhoods are.

5 We can consult, even if it's in a different jurisdiction,
6 we can consult with local public defenders to get help and
7 physical protection. People can go with us to dangerous places.
8 Mexico, in particular, is a different story, and this applies to
9 many foreign countries.

10 There are physical safety risks because of ongoing gang
11 violence, risk of kidnapping, carjacking. You only need look at
12 the State Department's advisory notices for whatever country
13 you're visiting.

14 And also in this country, we know if something goes wrong,
15 we can take out our cell phone and call 911. One of the things
16 that the State Department makes clear about Mexico and some of
17 the other places where I have sent mitigation investigators is
18 that there are places where they are unable to ensure the
19 protection of American citizens traveling --

20 MS. GROOVER: Your Honor, I would like to object to this
21 line of answer as it's speculation. This witness has not
22 personally conducted a mitigation investigation in this
23 scenario, and he's relying just generally on State Department
24 warnings for providing this testimony.

25 THE COURT: All right.

1 MR. ERTL: Judge, I'm going to bring it specifically to
2 a specific region in this case, and I'm going to introduce the
3 document from the State Department about a travel advisory.

4 THE COURT: I'm going to sustain the objection. Mr.
5 Stetler testified that he has not conducted a Mexican
6 investigation and he's not qualified to conduct a Mexican
7 investigation because of his cultural and linguistic
8 limitations. He can testify generally about his knowledge about
9 international investigations, which he has conducted.

10 MR. ERTL: But he's supervised them. He's supervised
11 people who are conducting. So as a supervisor, he's familiar.
12 He's familiar with the obstacles that are going to arise in
13 investigating a case in Mexico because he's had to send people
14 there and he's had to deal with those issues.

15 THE COURT: My understanding is he has not supervised a
16 Mexican mitigation; is that correct?

17 MR. ERTL: No, I think that's incorrect. He did
18 supervise. He said that earlier, in his earlier, he had
19 supervised the Mexican. I will ask that question again just to
20 clarify.

21 THE COURT: Please do, and let's keep this testimony
22 constrained to his direct experiences and what his
23 qualifications are.

24 Q. (By Mr. Ertl) Have you supervised a mitigation
25 investigation that was conducted in Mexico?

1 A. Yes.

2 Q. And do you know approximately how many times?

3 A. It's a small number. I would say probably three or four.

4 Q. And in those investigations that took place in Mexico, did
5 there -- were you made aware of difficulties, problems that
6 arose in those investigations?

7 A. Yes. In addition to the safety issues, there were often
8 problems just in locating the people that they wanted to talk
9 to.

10 Again, the contrast with this country is we have
11 commercial databases which will provide addresses for people
12 that we're trying to find. There's nothing comparable for
13 identifying where people live, and then once we have developed
14 information about where someone lives in Mexico, often we're
15 talking about places that are very difficult to find, remote
16 areas that are unpaved, unmarked and where my investigators, my
17 mitigation specialists, have had to have local guides who could
18 figure out where the village was or where the nearest village
19 was so that they could then try to find the people, and the
20 interaction between safety issues and these logistical issues is
21 important also because if there are safety issues and we can't
22 stay in an unsafe area in the evening and we have people who are
23 working, dawn to dusk, it's very, very hard to establish a time
24 when you can make the contact with the witnesses.

25 I mean, obviously we deal with these problems as they

1 arise, but those are the sorts of complications which are
2 typical.

3 Q. Why couldn't you bring the witnesses to you like to your
4 hotel?

5 A. Well, that's a good question. The problem is that you
6 really are trying to interview people in the area where the
7 client actually grew up because you want to see the conditions
8 there.

9 You want to photograph and document what that village is
10 like. You want to know whether there is electricity and running
11 water, whether the houses are one-room structures in which large
12 numbers of people are living; is there indoor cooking or is the
13 cooking at a wood fire outside, so you want to go on the ground
14 to the location and, in addition, that's going to lead you to
15 witnesses that you don't know about. If you bring all the
16 witnesses just to your hotel, awkward as that probably is going
17 to be for the witness, you're not going to find all the other
18 people that are neighbors or coworkers or childhood friends that
19 might be part of your expanding investigation because, when
20 you're on the ground, you're not just seeing five specific
21 people. You're trying to figure out who are the other people
22 who could provide useful information.

23 Q. In your experience in supervising Mexican -- mitigation
24 investigations conducted in Mexico, were there other
25 complications once the witnesses were found?

1 A. Yes. Because, again, I indicated that there are barriers
2 to disclosure, things that people find very awkward to talk
3 about and that's compounded when people come from another
4 culture.

5 You have cultural attitudes towards mental illness,
6 towards childrearing or what is appropriate discipline in the
7 home and also suspicion of us as coming from the United States.

8 It's hard for them to understand the defense function
9 generally. They are not schooled in the United States criminal
10 justice system, but especially they are not likely to know
11 anything about what a sentencing proceeding is going to be, so
12 we need to explain to the family members and other witnesses
13 that we are there on behalf of their son, brother, loved one,
14 person from their community, and also that this is a very
15 serious proceeding in which everything we learn about their
16 background may be relevant to the punishment in the case.

17 Many of these countries that I've mentioned don't have a
18 death penalty, don't have a sentencing proceeding and mitigation
19 is a brand-new concept in, you know, for American jurors. You
20 know, when they sit in death penalty cases, they learn about
21 mitigation, something they haven't heard about before, and it's
22 the same for clients' family members, relatives, teachers and so
23 forth. We have to explain this unusual concept that they
24 probably never heard of before.

25 Q. What's your experience in the ability to gather records in

1 Mexico?

2 A. They are very scarce and they are not centralized. So
3 they are precious when they are found but they are extremely
4 difficult to find.

5 Q. I'd like to if I can talk to you now about the importance
6 of presenting mitigation in the preauthorization stage of the
7 case like this case is. Could you generally explain why
8 presenting mitigation in the preauthorization stage is
9 important?

10 A. Well, it is a very important decision that the local US
11 Attorney's Office has to make in terms of its recommendation to
12 main Justice and the Defense wants to provide as robust a
13 submission as possible. In addition, the early investigation
14 may disclose evidence of intellectual disability, for example,
15 which would be potentially dispositive.

16 The case may not need to go forward as a death penalty
17 case and wouldn't even have to be decided at main Justice if
18 there is overwhelming evidence of intellectual disability, so
19 whatever you work up in this early investigation has tremendous
20 importance and, of course, you know, as the Spencer report
21 update that you showed me earlier makes clear, there is a
22 tremendous cost-saving if there is not going to be an
23 authorization, so it isn't just for the sake of the individual
24 defendants, but in terms of court time and resources, the
25 presentation that is made to the local US Attorney and

1 potentially also made to the Department of Justice has all of
2 that significance about how complicated this case is going to
3 be, whether it needs to go forward as a death penalty case, and
4 again as I think I have mentioned, many, many death-penalty-
5 eligible cases do not proceed to a notice to seek the penalty or
6 are resolved and that's another area.

7 If cases are resolved by negotiated disposition, it is
8 often because of the evidence that can be presented in the
9 preauthorization submission.

10 Sometimes part of the presentation is a willingness to
11 agree to a negotiated plea and the mitigation investigation not
12 only may influence the prosecution in deciding whether there are
13 reasons why they should not seek the death penalty or why this
14 case is not as clearcut as they initially thought, and in
15 addition you are identifying in this investigation people who
16 may be important allies who can help clients grapple with very,
17 very difficult decisions about whether to enter into a plea,
18 people who care about whether the client lives or dies, people
19 who will put money on his books 20 years from now, people who
20 will take his phone calls but want to ensure that he is not
21 executed. So all of those things kind of interrelate.

22 Q. We talked -- you talked about in general mitigation
23 investigation and specifically now we've talked about some of
24 the problems in conducting one in Mexico.

25 How -- I know it's going to be a difficult question -- how

1 long do you need to conduct a proper mitigation investigation?

2 THE COURT: Please wait before you answer. The
3 interpreters are swapping.

4 INTERPRETER DAVIS: Thank you, Your Honor.

5 THE COURT: Ready to proceed, Ms. Davis?

6 INTERPRETER DAVIS: Yes, Your Honor. Thank you.

7 THE COURT: Go ahead, Mr. Stetler.

8 THE WITNESS: I can't give you an exact number of
9 months.

10 MS. GROOVER: Objection, speculation. He's only done
11 three or four cases in Mexico.

12 MR. ERTL: I will just relate it to -- if you want to
13 just talk about general mitigation investigation, take Mexico
14 out of the equation.

15 THE COURT: All right, you can answer it.

16 THE WITNESS: I think you want the mitigation
17 investigation to be sufficiently substantial that you've
18 identified themes, you've identified potential mental health
19 issues so that you can make a robust presentation to the
20 prosecution.

21 Q. (By Mr. Ertl) In your opinion, could a proper mitigation
22 investigation be conducted in four months? Would it take
23 longer than four months to do a proper mitigation
24 investigation?

25 A. Yes.

1 Q. Could it take up to a year?

2 A. Yes.

3 Q. Could take longer?

4 A. Yes.

5 Q. And the problems that we've discussed about conducting
6 mitigation investigation in Mexico, that just compounds the
7 difficulties in a mitigation investigation in general; right?

8 A. Yes.

9 Q. I think -- Mr. Stetler, you talked a little bit before
10 about travel advisories. Did you check -- did you look into
11 travel advisories in particular to some of the geographical
12 locations that are important in this case -- well, first of all,
13 strike that.

14 Let me go back. Were you informed of geographical
15 locations in this case that a mitigation investigation would be
16 conducted into?

17 A. Yes.

18 Q. And did you do any research to find out if there were
19 travel advisories associated with those geographical locations?

20 A. Yes.

21 (Defendants' Exhibit 7 was marked for
22 identification.)

23 Q. (By Mr. Ertl) If I may approach, Your Honor. Let me show
24 you what's been previously marked as Defendants' Exhibit Number
25 7. I've provided a copy to the Government already, Judge.

1 Can you take a look at Defendants' Exhibit 7 and see if
2 you recognize that?

3 A. Yes.

4 Q. Okay, what is it?

5 A. It's a Mexico travel advisory from the Department of
6 State.

7 Q. And can you tell us what the Department of State generally
8 advises about travel to Mexico?

9 A. The general advice is exercise increased caution due to
10 crime and kidnapping. Some areas have increased risk.

11 Q. And Defendants' Exhibit 7, is that a document that you
12 obtained?

13 A. Yes, I just --

14 Q. How did you obtain it?

15 A. Looked it up on the Internet.

16 MR. ERTL: Judge, I would move for the admission of
17 Defendants' Exhibit Number 7.

18 THE COURT: Any objection?

19 MS. GROOVER: Your Honor, the Government has no
20 objection to The Court taking under advisement the public
21 advisories from the Department of State. However, with respect
22 to the relevancy, there's different levels, and there has been
23 no foundation to what levels apply and specifically as related
24 to the case where potential witnesses or records are located.

25 Q. (By Mr. Ertl) I will try to remedy that, Judge. I think

1 you said you were told of some geographical locations where
2 investigation had to take place in this case; correct?

3 A. Yes. The first page of my declaration indicated specific
4 geographic regions, and one of them, Rio Bravo, is in Tamaulipas
5 state, and if you -- the specific advisory listings are
6 alphabetical.

7 If you turn to that page -- it's not a numbered page, but
8 the page which covers Tamaulipas state, it's Level 4, do not
9 travel due to crime and kidnapping.

10 Q. And we also have I think Chiapas. Is there any type of
11 advisory for -- let's do it this way. Hildago, Mexico City and
12 Chiapas are the other three.

13 A. Yeah. I think most of the areas are what the State
14 Department calls Level 2. Again, violent crime, homicide,
15 kidnapping, carjacking, robbery, widespread. US Government has
16 limited ability to provide emergency services to US citizens,
17 and in the case of Level 4 with Tamaulipas state, violent crimes
18 such as murder, armed robbery, carjacking, kidnapping, extortion
19 and sexual assault is common. Gang activities including gun
20 battles and blockades is widespread. Armed criminal groups
21 target public and private taxi or buses as well as private
22 automobiles travelling through Tamaulipas, often taking
23 passengers hostage and demanding ransom payments. Federal and
24 state security force have limited capability to respond to
25 violence in many parts of the state.

1 MR. ERTL: Can I have a moment, Your Honor?

2 THE COURT: You may.

3 Q. (By Mr. Ertl) Let's go back to mitigation, I'm sorry. I
4 forgot this, to go over this.

5 Is it important to understand -- to have a good
6 understanding of the case, of the discovery in a capital case,
7 before you start to conduct a mitigation investigation?

8 A. Well, it's simultaneous with the mitigation investigation.
9 I wouldn't wait to begin the investigation, but obviously the
10 two go hand in hand, so understanding the discovery is
11 absolutely critical.

12 Q. And you talked a little bit earlier about building a
13 rapport with the family and the client. How in your experience,
14 what are some of the ways that you can build rapport -- let's
15 talk about -- with the client?

16 A. Well, you want to build rapport with the client by
17 listening to the client's explanation relevant to culpability.
18 If they have leads that they want you to pursue, you want to
19 investigate those. You want to have an ongoing dialog about
20 what the evidence is that the Government intends to present, and
21 so it's that interactive dialog that's going to help the client
22 understand how serious the case is, but also see whether you are
23 pursuing their suggestions, their leads and not just ignoring
24 them.

25 They are going to pay very close attention to how you're

1 investigating the guilt/innocence issues in the case, and that's
2 why you have a full team, not just a lawyer and mitigation
3 specialist.

4 Q. In your experience, is it important for the defendant to
5 have an understanding of what is in the discovery as part of
6 your mitigation investigation?

7 A. Yes, absolutely.

8 MR. ERTL: That's all I have, Your Honor.

9 THE COURT: All right, Ms. Groover, any
10 cross-examination?

11 MS. GROOVER: Yes, thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MS. GROOVER:

14 Q. Good afternoon.

15 A. Good afternoon.

16 Q. Sir, did you personally consult on this particular case
17 for today? Did you personally consult for mitigation? Are you
18 part of the mitigation investigation for this case today?

19 A. No.

20 Q. So you didn't review any of the file prior to coming
21 today?

22 A. I looked at the indictment. I mean, as you probably saw,
23 my declaration was prepared just a week ago, so I'm not involved
24 in ongoing consultation.

25 Q. So your familiarity with this case has to do with the

1 indictment and speaking with, I assume, Mr. Ertl in preparing
2 for today?

3 A. That's correct.

4 Q. So you're really not in a position to determine how much
5 time is necessary for this particular case to develop a
6 mitigation timeframe?

7 A. I don't have details about what that will be.

8 Q. Okay. And would you agree that possible mitigation
9 investigations would include counsel reviewing all the discovery
10 produced by the Government in this case?

11 A. Oh, yes, that's important.

12 Q. And would you agree that possible mitigation investigation
13 would include interviewing the actual client, the defendant?

14 A. That's where you start.

15 Q. And would you agree in a case where you have foreign
16 nationals involved possible mitigation investigation would
17 include reviewing the alien file of the individual?

18 A. You want to review any documents that you can obtain.

19 Q. Would you agree that possible mitigation investigation
20 would include interviewing past employers of an individual in
21 the United States?

22 A. Of course.

23 Q. And would you also agree that possible mitigation
24 investigation would include interviewing possibly individuals
25 from the Department of Justice or prosecutors, other case agents

1 on the case?

2 A. If -- if they are willing to speak to you.

3 Q. Yes. Would you agree that possible mitigation
4 investigation would include speaking with local law enforcement
5 that had personally investigated the case?

6 A. Again, if they are willing to speak to you, you want to
7 obtain information from as many sources as you can, but they are
8 not a substitute for the broad international investigation that
9 I described.

10 Q. Of course. Of course. And would you also agree that if a
11 defendant has a prior federal criminal conviction, a good way, a
12 possible mitigation investigation would include reviewing that
13 prior PSI?

14 A. Yes, of course, and you want to see the -- the outcome of
15 that case, you want to see whether it's something that should be
16 reinvestigated at this point, so you always are looking at any
17 prior criminal allegations or convictions and see what's the
18 basis for setting them aside.

19 Q. And those other prior cases will give good basis for
20 starting, for gathering the history and characteristics of the
21 defendant; correct?

22 A. Well, to a very limited extent. They are not at all the
23 same as conducting the sort of biographical investigation that
24 I've described.

25 Q. Would you agree that in general these are just simple

1 straightforward steps that counsel can do here in the United
2 States as part of a mitigation investigation?

3 A. It will do all of those, but, again, we're talking apples
4 and oranges. It's important to get information from every
5 possible source, but it's not a substitute for the investigation
6 that needs to take place on the ground.

7 Q. And would you also agree that if a defendant is a foreign
8 national but has been in the United States for some period of
9 time, for example, at least ten years, there's possible
10 mitigation investigation and evidence that can be found here
11 within the United States?

12 A. Of course.

13 Q. And would you agree that these are only parts, that this
14 preliminary investigation can continue throughout the entire
15 case? It doesn't have to stop with respect to presentation to
16 the local prosecutor's office?

17 A. No. I certainly would not suggest that investigation ends
18 with the preauthorization submission but it needs to be
19 sufficiently robust that at the time of the submission you are
20 touching on the major issues that you've identified with months
21 and months of work so that it's going to be consistent with what
22 you continue to explore with a view to presentation in the event
23 the case goes to a penalty proceeding.

24 Q. Now in your declaration on I believe it's Page 29, you
25 indicate that you have supervised staff who went to Mexico for

1 mitigation and you've previously testified today approximately
2 three or four times; is that correct?

3 A. I think that's right. I don't want to exaggerate. It may
4 have been more.

5 Q. And do you recall what years these were when you
6 supervised the Mexican mitigation investigation?

7 A. Between 1995 and 2005. I have a vivid recollection of one
8 case in Brooklyn where virtually all the men from the village
9 had moved to Brooklyn and the investigation on the ground in
10 Mexico found that only women, children and elderly people
11 remained and so it was a fascinating investigation, and there
12 was a de facto mayor of the village in Brooklyn who would go
13 around and talk to all the men who had come from that village,
14 collect unofficial taxes and then communicate back to the
15 village, you know, "We're putting in a new water system, and all
16 of the men who were working in the United States are
17 contributing to that," so it was a fascinating, you know,
18 particular story that stays in my mind.

19 Q. Okay, and so you have been involved in cases in Mexico,
20 the three to four, between 1995 and 2005; is that fair?

21 A. That's correct.

22 Q. So are you familiar with the Mexican Capital Legal
23 Assistance Program?

24 A. I've had a little contact.

25 Q. And describe the contact that you've had, sir.

1 A. I participated in one of their training programs in
2 California some years ago.

3 Q. And what's your understanding of the Mexican Capital Legal
4 Assistance Program?

5 A. That they -- the Mexican Capital Legal Assistance Program
6 attempts to facilitate the work of counsel on behalf of their
7 nationals.

8 Q. You have no reason to dispute that it was created by the
9 Mexican Government in approximately 2000?

10 A. Sounds right.

11 Q. And --

12 A. And, of course, the Mexican Government, like our
13 Government, changes from one administration to the next so I
14 think it's -- it has gone through different transformations over
15 the years.

16 Q. And would you agree that one of the main purpose is to
17 help defense attorney construct biographic -- biography of the
18 accused to humanize them; that's one of their main purposes,
19 would you agree?

20 A. I think they assist in that.

21 Q. They help determine poverty issues and family dysfunction
22 and developmental disabilities?

23 A. Yes.

24 Q. So they assist tracking down mitigation evidence; would
25 you agree with that?

1 A. They can.

2 Q. And do you also agree that the program arranges for
3 lawyers to go to Mexico to track down school, hospital records
4 and travel and pays for travel costs?

5 A. I don't know about payment, but they provide assistance in
6 some of these areas.

7 Q. So in your declaration -- I believe it's on Page 29 -- you
8 indicate that defense personnel are really on their own in these
9 mitigation investigations. Would you agree that you're not
10 really on your own with the Mexican Capital Legal Assistance
11 Program?

12 A. Well, there's limits to how much assistance they can
13 provide. And as the State Department said in some of these
14 areas, you know, there's no 911 call. The US Government can't
15 help you, and there are areas where the Mexican Government can't
16 help you either.

17 Q. And you're familiar with the justice manual as part of the
18 death protocol process?

19 A. Yeah. I'm not an expert on it.

20 Q. Have you reviewed it?

21 A. Not for this proceeding.

22 Q. Okay. Do you have any reason to dispute that the defense
23 counsel -- that the justice manual would provide defense counsel
24 another opportunity to present mitigation evidence not just in a
25 local level but in the event that the matters proceeded to

1 another stage?

2 A. You mean at main Justice?

3 Q. Yes.

4 A. Yes.

5 Q. And would you also agree that if a notice to seek death
6 penalty is filed the justice manual further provides an
7 opportunity for the United States on its own to request that the
8 notice to seek the death penalty could be withdrawn for a number
9 of reasons?

10 A. Yes. It is often a lot of efforts in that area based on
11 changed circumstances.

12 Q. And do you also agree that even if a notice of death is
13 filed, the justice manual provides an opportunity for the
14 defendant through his counsel to request that that be withdrawn?

15 A. Yes.

16 Q. So would you agree that even after a preliminary
17 mitigation investigation, counsel can learn of new mitigation
18 agreements and have multiple opportunities to present the new
19 evidence and arguments in mitigation before and after a decision
20 is made?

21 A. That is hypothetically true.

22 Q. Okay.

23 A. And there are many instances in which, in spite of an
24 early decision, the decision has been changed. However, there
25 is no substitute for, you know, what I've referred to as a

1 robust initial presentation.

2 MS. GROOVER: Thank you. Your Honor, may I have just
3 one moment, please?

4 THE COURT: You may.

5 MS. GROOVER: Just briefly, Your Honor.

6 THE COURT: Proceed.

7 Q. (By Ms. Groover) Again, you go back to the importance in
8 your opinion of this robust mitigation investigation, but in
9 this case, you're not familiar at all with what has been done
10 or what needs to be done and so you have no idea what kind of a
11 timeframe would be necessary; would you agree?

12 A. Yes. I don't know the details of what has been done.

13 MS. GROOVER: Thank you. No further questions.

14 THE COURT: Any redirect?

15 MR. ERTL: Nothing further, Your Honor.

16 THE COURT: Thank you, Mr. Stetler. You can step down.

17 MR. ERTL: May Mr. Stetler be excused? He has a plane
18 to catch.

19 THE COURT: He may. Mr. Ertl, I understand you have Mr.
20 Singer as your next witness and I believe you said he intends to
21 testify about the discovery in this case and review --

22 MR. ERTL: It will be brief, if you want to do that.

23 THE COURT: Let's take a ten-minute recess and we will
24 reconvene and take up Mr. Singer.

25 (Recess from 12:27 p.m. to 12:39 p.m.)

1 THE COURT: Mr. Ertl, are you ready to proceed with your
2 next witness?

3 MR. ERTL: Yes, Your Honor, we call Richard Singer.

4 RICHARD SINGER,

5 having been first duly sworn, was examined and testified as
6 follows:

7 THE CLERK: Thank you. You may be seated. Please state
8 your full name, spell your last name for the record, state your
9 occupation and your business address.

10 THE WITNESS: My name is Richard Singer, S-i-n-g-e-r.
11 I'm a federally certified court interpreter and I reside in
12 Atlanta, Georgia.

13 MR. ERTL: Just, I just, for what it's worth, this will
14 be our last witness, and so if The Court is inclined to go
15 through without a lunch break, we're more than okay with that.

16 THE COURT: All right.

17 DIRECT EXAMINATION

18 BY MR. ERTL:

19 Q. Okay, Mr. Singer, are you self-employed or do you work for
20 a company?

21 A. I'm self-employed.

22 Q. You said you're a court certified interpreter. How long
23 have you been a court certified interpreter?

24 A. I was certified by the Administration of the United States
25 Courts in 1982, so I have been doing this for approximately 37

1 years now.

2 Q. What exactly does it take to become a federally certified
3 court interpreter?

4 A. Basically you have to have native English skills as well
5 as I've completed courses in interpretation. There are three
6 basic skills for that interpretation, which are sight
7 translation, consecutive interpretation and simultaneous
8 interpretation as these excellent professionals are doing right
9 here, so you have to be able to do this.

10 Q. Just a little bit...

11 A. I noticed this before, but it doesn't quite carry. So you
12 need to be able to listen to what is going on in the courts and
13 simultaneously interpret for The Court as well as defendants.

14 Q. And in what courts, if you will, have you served as an
15 interpreter?

16 A. I've been an interpreter in district courts in Georgia,
17 Northern District and Middle District in Alabama, Tennessee,
18 South Carolina, North Carolina, and I have worked also in
19 Florida and in Mississippi.

20 Q. Other than courts, have you provided interpreting services
21 for any organization or governmental agents?

22 A. Yes. I'm also a conference interpreter and I have worked
23 extensively in academic and professional conferences. I work
24 for the Centers of Disease Control and Prevention, for the
25 Carter Center. I'm also certified by the United States

1 Department of State for seminar and conference interpretation.

2 Q. Other than as a federally certified interpreter, have you
3 been otherwise employed?

4 A. Oh, yes, I was previously director of international
5 marketing for Lockheed Martin Aircraft Company and I did this in
6 Canada and in South America. I also worked many years in Spain
7 and in Argentina with Polygram Record Group.

8 Q. So is -- were you born in the United States?

9 A. No, I was born in Argentina.

10 Q. And how long did you live there before you moved somewhere
11 else?

12 A. Well, I came to the United States permanently when I was
13 about 38 years old, but I am -- as I said, I have native
14 language skills in English and Spanish. As I said, I was born
15 and raised and educated in Argentina.

16 My parents are Americans, so we had a completely bilingual
17 home and bilingual education in all the schools that I attended.

18 Q. How did you become involved in this case?

19 A. I was asked by the federal defender office, by yourself,
20 if I could look at some exemplars of documents and basically
21 read them and time how long it would take to read an example
22 page of the material that was given to me.

23 Q. Okay, and did you prepare -- well, did you and I prepare a
24 declaration?

25 A. Yes, we did.

1 MR. ERTL: If I may approach, Your Honor.

2 THE COURT: You may.

3 (Defendants' Exhibit 2 was marked for
4 identification.)

5 Q. (By Mr. Ertl) Let me show you what has been previously
6 marked as Defendants' Exhibit Number 2 for identification.

7 Do you recognize that document?

8 A. Yes, I do.

9 Q. What is it?

10 A. This is my declaration concerning the pages that I have
11 read and the timing that it took and essentially an estimate of
12 total time that it would take to work through all the material
13 that I've been told is involved in this case.

14 Q. Did you sign that?

15 A. I did.

16 MR. ERTL: Judge, I move for the admission of
17 Defendants' Exhibit Number 2.

18 THE COURT: Any objection?

19 MS. GROOVER: No objection.

20 THE COURT: It's admitted.

21 Q. (By Mr. Ertl) Let's take care of one of my mistakes in
22 this document right off the bat. Would you look at Footnote 5?

23 A. Uh-huh.

24 Q. And you see that first line that says, "In addition to the
25 35,000" -- or second line, I'm sorry. "In addition to the

1 35,000 pages that calculate the above"?

2 A. That's correct. I see it.

3 Q. That is not consistent with the 37,000 pages that appear
4 in Paragraph 4; correct?

5 A. Right.

6 Q. So that 35,000 in Footnote 5 should actually be 37,000?

7 A. That's correct.

8 Q. Now, you said a few minutes ago that I had asked you to
9 interpret some documents and time yourself for how long it took?

10 A. That's right.

11 (Defendants' Exhibit 8 was marked for
12 identification.)

13 Q. (By Mr. Ertl) I'm going to show you a series of
14 documents. Let me show you what I've marked as Defendants'
15 Exhibit Number 8 for identification.

16 A. Uh-huh.

17 MR. ERTL: Judge, these are the documents that I think
18 we need put under seal.

19 THE COURT: All right.

20 MR. ERTL: Some type of protective order.

21 THE COURT: Mr. Ertl, is there any request that the
22 hearing be sealed or just the documents?

23 MR. ERTL: Just the documents itself. I'm not going to
24 get into the contents.

25 THE COURT: Ms. Groover, any objection to placing these

1 under seal and proceeding in open court?

2 MS. GROOVER: No objection.

3 THE COURT: These will be placed under seal and not
4 available publicly on the court docket.

5 Q. (By Mr. Ertl) Do you recognize Defendants' Exhibit Number
6 8?

7 A. I do.

8 Q. Is that one of the documents I asked you to interpret?

9 A. Yes.

10 Q. Can you tell The Court how long it took you to interpret
11 Defendants' Exhibit Number 8?

12 A. On the first read, this document took me one minute and
13 eight seconds.

14 Q. And that document, does it look like -- how would you
15 describe it?

16 A. It appears to be a copy of a transcript, a court
17 reporter's transcript.

18 Q. And you said it took you how long?

19 A. One minute and eight seconds.

20 MR. ERTL: Move for the admission of 9 or 8, I'm sorry.

21 MS. GROOVER: No objection to all of these.

22 MR. ERTL: If I can, Judge, I'm just going to give all
23 the copies to Mr. Singer and to Your Honor.

24 THE COURT: Yes, please do.

25

1 (Defendants' Exhibit 9 was marked for
2 identification.)

3 Q. (By Mr. Ertl) Defendants' Exhibit Number 9, is that a
4 document I asked you to interpret?

5 A. Yes, it is.

6 Q. Can you describe what the document is?

7 A. Yes. It is an affidavit and an application for a search
8 warrant.

9 Q. How long did it take you to interpret that document?

10 A. This one took me approximately seven minutes on the first
11 read.

12 Q. Seven minutes?

13 A. Yes.

14 (Defendants' Exhibit 10 was marked for
15 identification.)

16 Q. (By Mr. Ertl) If you would, look now at Defense Exhibit
17 Number 10. What does that appear -- do you recognize that
18 document?

19 A. Yes, I do.

20 Q. Is that one of the documents I asked you to interpret?

21 A. Yes, it is.

22 Q. And can you tell The Court what it appears to be, that
23 document?

24 A. This is an investigative report from the Garden City
25 Police Department.

1 Q. And it's Page 3 of 8?

2 A. Correct.

3 Q. How long did it take you to interpret that document?

4 A. This document took me four minutes and 54 seconds and
5 37/10ths on the first read.

6 Q. So approximately four minutes and 37 seconds?

7 A. It's the tenths that count.

8 (Defendants' Exhibit 11 was marked for
9 identification.)

10 Q. (By Mr. Ertl) Let me show you, take a look at Defendants'
11 Exhibit Number 11?

12 A. Yes.

13 Q. Do you recognize that?

14 A. I do.

15 Q. Is that a document I asked you to interpret?

16 A. It is.

17 Q. Can you tell The Court how long it took you to interpret
18 Defendants' Exhibit Number 11?

19 A. To read this entire application, this took two minutes and
20 52 seconds.

21 (Defendants' Exhibit 12 was marked for
22 identification.)

23 Q. (By Mr. Ertl) Defendants' Exhibit Number 12, can you take
24 a look at that. Is that a document you're familiar with?

25 A. Yes, I did.

1 Q. And what if you can describe it?

2 A. This is a list of phone calls, cell phone calls,
3 indicating date, time, originating number and terminating
4 number.

5 Q. Okay, and there are other -- there's other information on
6 that but you were advised not to interpret that?

7 A. That is correct, I did not. I read only the initiating
8 and terminating numbers.

9 Q. Is that a document I asked you to interpret?

10 A. Yes, it is.

11 Q. And how long did that take?

12 A. This one took me six minutes.

13 (Defendants' Exhibit 13 was marked for
14 identification.)

15 Q. (By Mr. Ertl) And finally Defendants' Exhibit Number 13?

16 A. Yes.

17 Q. Is that a document that you're familiar with?

18 A. Yes. This was another one of the documents that you gave
19 me.

20 Q. And what does it appear to be?

21 A. This a bank extract indicating withdrawals and other
22 subtractions, basically ATM and debit card extractions.

23 Q. Did you time yourself when interpreting that document?

24 A. I did. This one took me five minutes and 19 seconds.

25 Q. Okay. As part of what I asked you to do in this case, did

1 you average the time it took on four of -- particularly these
2 documents?

3 A. Yes, I did. I took all the time that all these six
4 different documents, took me to basically sight translate, to
5 read them, and I came to an average of approximately four
6 minutes.

7 Q. These are only the first four document?

8 A. Yes.

9 Q. Defendants' Exhibit 8, 9, 10, and 11, not the bank records
10 and the phone records?

11 A. No, sorry, that is the average for the entire six
12 documents. I did not do the first four, I'm sorry. I
13 misunderstood that. Let me see that.

14 Q. Do you have your declaration up there?

15 A. Yes, is that correct?

16 Q. In Paragraph 4.

17 A. Yes.

18 Q. Could you take a look at that and see if it refreshes your
19 recollection as to which documents you took the average of?

20 A. Correct. I'm terribly sorry. I stand corrected. It was
21 the four documents, and that was the four minutes approximately.

22 Q. And in your -- approximately four minutes?

23 A. Yes.

24 Q. And did I ask you to assume there were a certain number of
25 documents that were representative of those four documents?

1 A. Yes, approximately 37,000.

2 Q. And based on your timing of your -- and the average of
3 those reading -- interpretation of those four documents, how
4 long would it take you to interpret those to a Spanish-speaking
5 client?

6 A. Approximately 2300 hours based on that time.

7 MR. ERTL: Did I move for the admission of Number 2? Is
8 that in?

9 THE COURT: I don't believe you have.

10 MR. ERTL: I move for the admission of Mr. Singer's
11 declaration, Defendants' Exhibit 2.

12 MS. GROOVER: No objection.

13 THE COURT: It's admitted.

14 Q. (By Mr. Ertl) Let me clarify something that I may have
15 left a little muddy. When I use the term "interpret," when I
16 said how long did it take you to interpret, what exactly did
17 you do?

18 A. It's what I call sight translation, which is essentially
19 interpretation. You read the document, which is, in this case,
20 the original Spanish and -- I'm sorry, original English and read
21 it out into Spanish, and this is essentially interpretation, but
22 it's actually called sight translation.

23 Q. And that's exactly what you did with all of the documents?

24 A. That is what I did with all of these documents.

25 MR. ERTL: No more questions.

1 THE COURT: For housekeeping you're tendering 9, 10, 11,
2 12 and 13 as well?

3 MR. ERTL: Correct, Your Honor.

4 THE COURT: And there is no objection?

5 MS. GROOVER: Correct.

6 THE COURT: Those are admitted. Any cross-examination,
7 Ms. Groover?

2000-01-01 00:00:00 00000000000000000000000000000000

1. **What is the primary purpose of the study?** (Please check one box)

12. **Good afternoon.**

13 Q. Do I understand correctly that the only document that you
14 have reviewed are the documents outlined in this declaration?

15 A. That is correct.

16 Q. But yet you have an understanding of how many thousands of
17 pages there are; correct?

18 A. It was suggested to me by Mr. Ertl that there are
19 approximately 37,000 pages of similar documents.

20 Q. Have you been retained to begin translating these
21 documents?

22 A No I have not

23 Q. To your knowledge, has anyone else been retained to review
24 these documents?

35 A I have no information

1 Q. Are you familiar, are there other ways to translate these
2 documents besides sight translation?

3 A. I mean, they can be translated directly, which is written
4 translation, which takes considerably longer.

5 Q. Are you familiar with any electronic processes or
6 applications to assist with translation?

7 A. Yes, none very good.

8 Q. You haven't found any electronic applications to assist
9 you?

10 A. There are a lot of advances in computer translation these
11 days, but it still requires a human touch.

12 Q. Okay, and to review?

13 A. As well as to review.

14 Q. Would you agree some applications like Google Doc app can
15 assist with your translation?

16 A. Yes, they probably could. They have gotten much better
17 over the years. They were laughable when they started.

18 Q. I understand, but that could save some of this time?

19 A. Potentially.

20 Q. Also with respect to -- and I apologize, I don't have a
21 numbered copy in front of me -- the documents that you
22 translated specifically, will you look at the phone records.

23 A. Yes.

24 Q. How exactly are you translating that, sir? Are you
25 translating only the top column words or are you translating

1 every single number from --

2 A. Every single number in the first five columns.

3 Q. Okay. So instead of letting the numbers speak for
4 themselves on a translated document, you are translating them in
5 Spanish, the number?

6 A. Yes. In timing this particular document I read all the
7 numbers out loud.

8 Q. Would you agree that it would be possible to only
9 translate the columns and let the numbers speak for themselves
10 in a document such as this?

11 A. Yes.

12 Q. And same with respect to Defendants' Exhibit 13, the bank
13 record document. Did you also translate this number for number
14 and word for word?

15 A. Number for number and word for word.

16 Q. Would you agree in a document such as this, the numbers
17 could speak for themselves and you would only necessarily need
18 to translate the words?

19 A. Not necessarily. This document has a lot of other words
20 included in it as to where the withdrawal was made or the
21 payment was made.

22 Some of it refers to beverage purchases, to billing and
23 all those things need to be translated or interpreted for a
24 Spanish speaker.

25 Q. But, for example, the date column, is it possible to just

1 translate the date at the top, the word "date" and let the
2 actual date numbers speak for themselves in that column?

3 A. Yes, that's possible.

4 Q. And same with the amount on the far right side. Is it
5 possible to only have to translate the word "amount" and let the
6 numbers speak for themselves?

7 A. Yes, that's correct, as long as the reader has a copy of
8 this right in front of him.

9 Q. And again, you have not begun any of these translations or
10 have not been hired to do this?

11 A. No, I have not.

12 MS. GROOVER: Thank you. I have no further questions.

13 THE COURT: Any redirect?

14 MR. ERTL: Nothing, Your Honor, that I think.

15 THE COURT: Mr. Singer, you can step down. Mr. Ertl, I
16 understand that was your last witness?

17 MR. ERTL: Yes.

18 THE COURT: Do you have any other documentary evidence
19 that you would like to submit?

20 MR. ERTL: None, Your Honor.

21 THE COURT: And Ms. Groover, to confirm, the Government
22 has no witnesses or documents.

23 MS. GROOVER: That is correct, Your Honor, only
24 argument.

25 THE COURT: Mr. Ertl, it's your motion. I will take

1 arguments from you at this time, and before you get started, I
2 want to be clear, I've read all the filings related to this.
3 I've reviewed most of the authority that's been cited, not all
4 of the key cases that have been cited, so I'm very familiar with
5 the issues and the law surrounding it so no need to rehash with
6 argument what is submitted in writing.

7 MR. ERTL: Judge, whatever The Court's practices, if The
8 Court would indulge us, we would like to get the transcript and
9 brief the issues to you. If we -- if you want to go forward
10 now, we can do that.

11 THE COURT: As I understand it with regard to the
12 testimony that was provided here today, that relates primarily
13 to two issues and that being the amount of time that would be
14 requested by the defendants and also the need for any extension
15 at all based on the facts of this case, but the testimony here
16 today wouldn't relate to the other issues, which are the legal
17 questions regarding The Court's authority or any requirement
18 under the due process clause or the Sixth Amendment as well. Is
19 that your understanding?

20 MR. ERTL: Yes.

21 THE COURT: Well, I will take argument on those other
22 issues. To the extent there's need for briefing related to the
23 transcript later on, we will take that up after this hearing.

24 MR. ERTL: I just want to -- another thing based on what
25 you just said. The testimony we put in here other than Mr.

1 Singer was not necessarily specific to this case. If there --
2 if The Court was asking about what has been done so far, if we
3 are going to present that, that would have to be in an ex parte
4 setting I believe because otherwise we would be getting into
5 matters I don't think the Government is entitled to, but I don't
6 think that -- I don't think that's necessary but I was just
7 curious based on your --

8 THE COURT: Let's table any of those issues for now and
9 take up arguments now on the precise legal issues and again
10 those relating to the due process argument and effective
11 assistance of counsel and then the inherent authority issues as
12 well.

13 MR. ERTL: Well, Judge, I think we have laid out what I
14 think is the law. We've provided some cases, the Puerto Rico
15 case that says this is a critical stage. There is also a Puerto
16 Rico case that says it is not.

17 What I will say is this circuit has not addressed it.
18 There isn't a District Court in the Eleventh Circuit that has
19 addressed the issues that we present here, so as far as -- I'm
20 not saying we're writing on a clean slate. Circuit wide, it's
21 an open question.

22 Our position is two-fold, Judge. First the I think
23 *Evitts versus Lucey* and *Ohio Parole Board versus Woodard* sort of
24 lay out the framework.

25 You don't have to provide the process, but once you do

1 provide a process, some form of due process applies, and I think
2 that's what *Ohio Woodard* -- *Ohio Parole versus Woodard* talks
3 about.

4 You have where executive clemency, there are at least
5 minimal due process concerns that apply to things as unique as
6 executive clemency. It's almost identical, and the Supreme
7 Court in a plurality opinion, I think it's actually Justice
8 O'Connor that provides the deciding vote that says at least some
9 minimal due process applies to executive clemency.

10 Here the Government is saying it would be in violation
11 of the separation of powers doctrine. We're not asking The
12 Court to interfere with their discretion. What we're asking The
13 Court for is a timeframe that allows the defendants to present a
14 meaningful presentation -- make a meaningful presentation to the
15 US Attorney, delaying that decision only briefly, so we can
16 conduct mitigation investigation, more importantly, so we can
17 get it -- have our clients understand the nature of the case
18 against them.

19 I think the most important thing -- and I'm not sure I
20 say this in the brief -- is the Government, one of the things
21 that the protocol sets out is that any -- all of the decision
22 makers have to consider the relative strength of the case. We
23 have to assess that.

24 I will speak for me. I don't know most of the players
25 in this case. There are huge numbers of -- huge numbers of

1 names that I have to talk to my client about to find out what he
2 can tell me about them.

3 Before I can talk to him about those people, he has to
4 understand what they have said about him. So he has to have
5 read the discovery or have had it read to him to -- before we
6 can make an assessment, a reasonable assessment, of the strength
7 of the Government's case.

8 For instance, you know, if one of the witnesses, if my
9 client knows that one of the witnesses has some prior
10 convictions that I don't know about --

11 THE COURT: Let me bring it back to the legal issues and
12 I want to take up the issue of due process completely
13 independently from the issue of effective assistance of counsel
14 and address those under their relative lines of authority.

15 So you discuss evidence in the *Ohio Parole Board* cases
16 but my reading of those cases and the law as it's been described
17 in those cases is that The Court first identified a protected
18 liberty interest, and then once a protected liberty interest was
19 identified, it then determined that due process rights attached
20 to evaluate that liberty interest, but in each of those cases,
21 it was where the State had adopted some sort of statutory
22 provision or some mechanism that provided a fundamental liberty
23 interest to those individuals that was then the object of the
24 procedural protections.

25 I've not seen a case -- and I don't see one in the

1 briefs -- that makes a similar sort of conclusion related to
2 provisions in the justice manual or even in the federal context
3 for something like a death penalty determination.

4 Can you point to a case in the federal sphere that
5 identifies that first step, the protected liberty interest?

6 MR. ERTL: I do not believe there is one, no. I think
7 the closest we have are those -- I think it's *McGill* and I can't
8 think of the other case that find that there's an inherent
9 authority in The Court to set a schedule, that The Court has
10 inherent authority to do that, but I cannot find a case on point
11 with this, but I think the clemency aspect is analogous almost
12 directly because it's the State creates a process, and as you
13 can see, in *Ohio versus Woodard*, there is no right to clemency,
14 but there is a right to the process.

15 Here there is a right to the process, and I think about
16 it like -- like this, Judge. If we came in here and -- this is
17 not the case -- but if we came in here and said -- and we found
18 evidence that the Government only allows a presentation under
19 the protocol if the defendant was white, there would be a due
20 process violation. There would be an equal protection
21 violation.

22 If there is a process set up and then there is something
23 that interferes with the defendant's right to that process, he
24 has a liberty interest here. His liberty interest is that's
25 hopefully not having a death sentence sought against him.

1 That's the liberty interest here.

2 So I think *Ohio versus -- Ohio Parole Board versus*
3 *Woodard* I think is analogous. I think it says there are at
4 least minimal due process and I think at its fundamental, due
5 process requires meaningful right to be heard.

6 On effective assistance, Judge, I think this Puerto Rico
7 case -- there are a host, as I'm sure you know -- and I think I
8 cited it -- that there are a host of cases that find it's not a
9 critical stage, but I think when you examine the nature of the
10 proceedings that it is a critical stage.

11 The fact that -- I would say -- let's say over 80
12 percent of the time the Attorney General follows the no
13 recommendation of the local US Attorney shows how important that
14 stage is, so I think there are no cases on point and -- except
15 for that Puerto Rico District Court case, but I think it's open
16 and I think if you look at what determines a critical stage of
17 the proceedings, this fits.

18 THE COURT: The Government's response is that, in part,
19 that for a proceeding to be a critical stage for the purpose of
20 effective assistance, it needs to be adversarial and there needs
21 to be some aspect that impairs the Defense on the merits for it
22 to qualify. Do you disagree that those are considerations under
23 that test?

24 MR. ERTL: I think they are considerations. I think
25 this is adversarial. I think if you look at the -- I think I

1 covered it in the reply. The Government, at least initially,
2 has decided it is going to seek permission to pursue the death
3 sentence; otherwise, we wouldn't have been given the opportunity
4 to make a presentation, so they are at least contemplating it.

5 If we can't go in there and -- well, if they are
6 contemplating it and we have to go in there and convince them
7 otherwise, it's adversarial in that. They are other -- I don't
8 want to say they are biased, but they are not -- the playing
9 field is not level.

10 They have already found whatever reason it is and they
11 have absolute right to find whatever reason to tilt towards the
12 death sentence.

13 THE COURT: Right, but where the cases have found
14 critical stage, it was an adversarial proceeding in the sense
15 that there were two adversaries proceeding before a neutral.

16 Here it's an interface just between the two adversaries.
17 There is no confrontation. It is simply that negotiation or
18 exchange or relationship between the two. That strikes me as
19 fundamentally different.

20 MR. ERTL: It might be different, but I don't think it
21 carries the day. I think there's still a substantial -- there
22 are substantial rights that can be won or lost at this stage,
23 and clearly if we lose it at this stage, if it goes to a death
24 penalty trial, we've -- there are scores of problems or -- I
25 don't say problems -- scores of disadvantages that go to a

1 defendant in a capitally prosecuted case versus a, if you will,
2 a regular trial. The death qualification of jurors, for
3 example, eliminates a whole host of people because of their
4 belief for or against -- or also against capital punishment.

5 THE COURT: Would you agree that there's a difference
6 between an important stage and critical stage for purposes of
7 the Sixth Amendment?

8 MR. ERTL: Yes. I think for the Sixth Amendment to
9 attach, it has to be a critical stage.

10 THE COURT: And there are many important stages where
11 the Sixth Amendment would not attach in the course of federal
12 criminal prosecution?

13 MR. ERTL: I would -- yeah, there are. I just don't
14 think this is one of them. I think this a critical stage where
15 the defendant stands to lose a lot if he is not able to
16 meaningfully participate.

17 THE COURT: All right. Regarding the inherent authority
18 component, the third part of the argument here, you indicated
19 that you may not be in a position to make a request as to the
20 specific amount of time or at least to go into detail about
21 what's been performed as of today's date. What can you
22 represent to The Court about that?

23 MR. ERTL: Well, I can't speak for the other defendants.
24 I can tell you that I have spent personally I would say well
25 over a hundred hours, because of the protective order, at the

1 Liberty County jail having discovery read to the defendant.

2 I mean, I would say probably hundreds, and we are not --
3 I would think even a tenth of the way through. And I think Mr.
4 Pablo Rangel-Rubio is -- he is -- I don't know if he is unique,
5 but everything, he is named in every count, he's -- so all of
6 the discovery is extremely relevant to him, to the money
7 laundering, to the harboring, to the three different various I
8 will say murder counts. So he has to have -- he has to have
9 access to all of it, and I think -- and it's my position that,
10 you know, until we can get everything -- I don't want to say
11 read to him, but give him access, meaningful access, to the
12 discovery, we can't really make a presentation.

13 It's not fair to make him go forward when he doesn't
14 necessarily know all the evidence, so I can say and I believe
15 The Court has signed a -- signed the order amending the
16 protective order.

17 For me -- I'm not going to speak for the other
18 defendants -- that will speed things up because I now can take a
19 Spanish-speaking paralegal and have them, you know, spend a week
20 at a time at the jail and going through the discovery with him,
21 so that -- the mitigation investigation is going on on a
22 parallel track, you know, so I think my biggest problem with the
23 discovery is getting my client access to the discovery.

24 THE COURT: But I'm still not hearing a specific ask for
25 time.

1 MR. ERTL: Well, if I was going to ask for a specific
2 time, we asked the Government for I believe six months in that
3 last letter if I'm not mistaken, and that's what I would ask
4 for.

5 I don't know what the other defendants would ask for. I
6 can't speak to the state of their investigation or their -- but
7 I would ask for something like that so we have six months, so
8 March.

9 THE COURT: All right. Now, under the guides to
10 judiciary policy there are recommendations to set certain
11 deadlines in the case and those include the deadline for the
12 defendant's submission, the deadlines for the US Attorney
13 submission to main Justice and then the deadline for the notice
14 of filing in the death notice.

15 Now the Government has challenged The Court's authority
16 to impose certain of those deadlines, but as I understand it,
17 there is no challenge to the authority of The Court to impose
18 that third and final deadline, the deadline for the filing of
19 the death notice in the case.

20 If The Court were to lack authority on those first two,
21 would the defendants be making a request for a deadline about
22 filing of the death notice?

23 MR. ERTL: I think the request I would -- the request I
24 would make is give you a date and say they can't do it before
25 then. I wouldn't be asking for a deadline.

1 I would be asking for at least enough time for me to
2 conduct the investigation so I can have an opportunity to
3 convince them that death is not the appropriate track for this
4 case.

5 THE COURT: All right. Ms. Groover.

6 MS. GROOVER: Thank you, Your Honor. The Government's
7 position is laid out in our response in opposition and it has
8 not changed and I believe it is articulated in that response.
9 So I just briefly overview it.

10 First, initially with respect to the due process claim,
11 the Government's position is that we don't even get there
12 because we are still in the prosecutorial discretion at this
13 point, and we're still making the decision about what
14 sentences -- what charges to bring and what sentence to
15 ultimately pursue, so the Fifth Amendment due process clause
16 would not be implicated in that, and any due process that the
17 defendants would be entitled to are still provided to them in
18 the process of the proceedings, and so we believe there is no
19 violation and it doesn't even apply at this stage. At the heart
20 of their motions seeking relief is the justice manual, our
21 internal procedures, and respectfully, it's the Government's
22 position that it's not within The Court's purview, and there is
23 no rights conferred under the justice manual.

24 The protocol generally does provide a series of layers
25 and safeguards in place before a decision is made whether or not

1 to seek the death penalty. Right now we're talking about the
2 very first stage. We're at the first stage when the US Attorney
3 makes his initial recommendation, and that's not something
4 that's taken lightly. There are a number of things as outlined
5 in the justice manual that must be considered and will be
6 considered.

7 It's not a simple seek or no seek. We review the facts
8 and the supporting evidence, the discussion of all the
9 prosecutorial considerations such as the role that he played,
10 obstruction of justice and whether or not that occurred, if
11 there's any retaliation, if there's any criminal conduct to be
12 considered and the behavior while incarcerated.

13 There's analysis of the threshold intent factors. There
14 is analysis of the aggravating factors and there's application
15 of mitigating factors as well as background and criminal record
16 of the victim and the defendants and the view of the victim's
17 family on whether or not to seek the imposition of the death
18 penalty.

19 So those are the materials that are put together and
20 considered and provided to the Attorney General's review
21 committee, and if anyone, the US Attorney or one reviewer on the
22 committee requests a conference, then the defense counsel are
23 invited to meet with the capital review committee prior to a
24 final decision is made.

25 So there are multiple layers of opportunities where

1 defense counsel would be offered an opportunity to present any
2 type of mitigation or arguments or evidence, and then finally
3 after a decision is made, there are still opportunities for that
4 decision to be reviewed again, new mitigation evidence.

5 The US Attorney himself could ask for reconsideration or
6 the defendant through counsel could ask for a reconsideration,
7 and so, although in this particular case, no decision has been
8 made, yet he wants to delay the process of the first layer, and
9 the Government has yet to hear, except this arbitrary number,
10 six months to a year, how much time is really necessary, and we
11 have yet to hear specifics about what has been done.

12 Without getting into attorney/client privilege -- we
13 don't want to get into that -- but we have not heard generally
14 what has been done, what still needs to be done and what it will
15 take to get that.

16 Instead, what the Government is hearing is attempts to
17 delay, and, with all due respect, it is time to move this case
18 forward, and the Government is not seeking to deny them any
19 opportunity to continue their mitigation investigation and then
20 present additional mitigation evidence.

21 We're just seeking to move this process along to the
22 very first stage of a rather lengthy important process. And so,
23 first of all, it's the Government's position that the justice
24 manual itself does not provide any kind of substantive rights to
25 the defendants to seek relief under.

1 Almost every single circuit court who has considered
2 whether or not the justice manual in general provides rights has
3 held that, including the Eleventh Circuit. And there are a few
4 circuit courts who have actually considered this in context of
5 the death penalty protocol.

6 THE COURT: Ms. Groover, let me ask you a question.
7 Part of your argument is there will be another opportunity to
8 present later on. But you also argue that the justice manual
9 doesn't provide any substantive right, so is there any mechanism
10 to enforce that or ensure that that's actually going to happen?

11 MS. GROOVER: The Government is telling you as an
12 officer of The Court we comply with our justice manual. We have
13 complied and we will comply.

14 There have been some cases where defense counsel have
15 filed motions to dismiss the death notice on the ground that the
16 justice manual has not been complied with.

17 It's my understanding that those cases, they have not
18 dismissed the notice to seek, and so the end result, though, is
19 there's no -- there's no -- The Court does not have the
20 authority under the justice manual if the justice manual is not
21 complied with, but there is recourse under the Constitution and
22 under the Federal Death Penalty Act because, once you have a
23 notice of death has been filed, that decision has been made, but
24 there's still opportunity for the Defense to present mitigating
25 evidence to the ultimate trier, the juror, and for the juror who

1 is actually going to make that decision to weigh the aggravating
2 and the mitigating evidence.

3 THE COURT: But that would only come after the AG's
4 decision; correct?

5 MS. GROOVER: That would be correct, but the AG is a
6 just a notice of what the Government would be seeking. It is
7 not the imposition of the sentence.

8 So the defendants, although if they make arguments that
9 they have somehow been denied the protocol, they would still
10 have an opportunity to ensure that their rights are upheld
11 throughout the trial and the litigation of this case.

12 THE COURT: I want you to focus on the third issue,
13 which is the inherent authority more so than the constitutional
14 arguments.

15 MS. GROOVER: Obviously, there are different District
16 Court opinions that conflict on this issue. There's the *McGill*
17 case that finds that The Court does have the inherent authority
18 under Section 670 to set deadlines, and then there's also the
19 *Sloan* decision and those cases are competing.

20 It's the Government's position that the *Sloan* court got
21 it right and that the *McGill* case is factually distinguishable
22 from this particular case. In *McGill*, the defendants didn't
23 even have discovery at that time.

24 INTERPRETER DAVIS: Interpreter begs The Court, ask
25 counsel to slow down.

1 MS. GROOVER: Thank you for reminding me to slow down.
2 I apologize.

3 In the *McGill* decision, it's the Government's
4 understanding from reading that case that the defense counsel
5 did not even have access to discovery at that point in time.

6 And so it's the Government's belief from reading the
7 opinion that part of The Court's decision in imposing that
8 schedule had to do with imposing schedules with respect to
9 discovery and use the recommendations under Section 670, but,
10 Your Honor, the *Sloan* court I believe interpreted it accurately
11 as Section 670 is not an inherent rule that The Court must
12 follow, but it's rather a recommendation, and it's the
13 Government's understanding from reading the Spencer report, from
14 the 2010, that the entire purpose of Section 670 is to help
15 streamline this process because these cases are inherently slow,
16 and they do take time.

17 Death is different, as many cases in courts have noted,
18 but courts became frustrated at the delay in the Attorney
19 General filing a notice whether it will seek or will not seek,
20 so it's the Government's understanding that the purpose behind
21 Section 670 is to help streamline things and not delay it even
22 further.

23 THE COURT: Let me break this issue into two parts as I
24 see it. Under the inherent authority analysis, there's a
25 question whether The Court can order the Government to extend

1 the deadline and the second question is whether it should in the
2 particular case.

3 My concern on the first part about whether the
4 Government can, looking at the split of approaches taken by
5 these District Courts, in *McGill* the court notes that the
6 judiciary policy guidelines are developed jointly by the staff
7 of the Department of Justice and defender services, and they
8 contemplated The Court imposing a deadline just like what the
9 defendant is asking for in this case, but here you're arguing
10 that The Court lacks even the ability to impose a deadline
11 that's been proposed there. How do you reconcile that?

12 MS. GROOVER: Recognizing it's not the strongest arm and
13 recognizing that the courts have found that absolutely you have
14 the ability to do that, it's the Government's position that
15 those are recommendations and not a fullout inherent rule of The
16 Court, but recognizing that it's possible that some courts have
17 found that The Court does have the authority to order a
18 deadline, we would just get back to this case in particular and
19 note that, I believe, One, that's been done, and, B, a
20 reasonable opportunity has already been granted.

21 In the May 14th I believe order from 2019, The Court
22 stayed all proceedings until the Attorney General makes a
23 decision on whether or not he will seek or not seek the death
24 penalty.

25 In that order, The Court notes that July 8th, 2019 is

1 the date for Defense to submit evidence and arguments in
2 mitigation to the US Attorney's Office, and so indirectly, The
3 Court has complied with Section 670 and did put forth a date for
4 defense counsel to submit their mitigation arguments, and then
5 even looking more specifically at this case, the Government
6 feels like it's not necessary to impose and extend a deadline
7 because the Government has provided a reasonable opportunity
8 under the justice manual and as well as this court has as well
9 provided defense counsel a reasonable opportunity to begin this
10 preliminary mitigation investigation and to submit any evidence
11 or arguments to the local US Attorney, to our office.

12 Defense counsel filed a motion to stay all proceedings
13 to allow them to focus on this issue, to allow them not to worry
14 about the substantive issues -- the motions to suppress and
15 that, rather, to take time to go to Mexico, if necessary, and
16 develop mitigating argument and evidence.

17 The Government did not object to that motion and
18 rather allow -- did not object to allow The Court to stay the
19 proceeding and indeed The Court did and allowed them the
20 opportunity to not worry about going through suppression issues
21 and other evidentiary issues and not even worrying about
22 litigation issues with respect to the death penalty, but rather
23 giving them sufficient time and reasonable opportunity to begin
24 their mitigation investigation, and so defendants have been on
25 notice of the protocol since December of 2018.

1 They have been continuously represented by very
2 competent counsel. They have had learned counsel since end of
3 February of 2019, and they have had an opportunity with the
4 criminal proceedings that were stayed to focus on mitigation,
5 and the Government respectfully submits that they have had an
6 appropriate amount of time and they've been given a reasonable
7 opportunity under the totality of the circumstances of this
8 case, and we respectfully submit that additional time is not
9 necessary.

10 THE COURT: Let me ask you just a couple more questions
11 on this question of can The Court issue this order. You're
12 familiar with the deadlines that are suggested in 670.

13 The first is a deadline for the defendant to submit
14 argument and evidence to the local US Attorney's Office. The
15 second is deadline for the US Attorney's Office to make its
16 recommendation to main Justice, and the third is a deadline for
17 the Government generally to file its notice in the case.

18 Is it your position that The Court lacks authority for
19 all three of those deadlines or only some of those deadlines?

20 MS. GROOVER: It's the Government's position that The
21 Court absolutely has the authority to invoke the deadlines to
22 file the death penalty, and indeed the district courts in our
23 district, the Southern District of Georgia, have done that.

24 It's the Government's position, though, with respect to
25 internal submissions that the local US Attorney's Office gives

1 to the Attorney General, to main Justice, that that is an
2 entirely in-house procedure that we would respectfully disagree
3 that The Court has the authority to order, but we do recognize
4 the clear language in Section 670 and that courts have disagreed
5 with that.

6 It's just the Government's position that those
7 recommendations in Section 670 are to help streamline things and
8 help get the Government moving and not delay things.

9 THE COURT: What about that first deadline, the deadline
10 for the defendant to submit their evidence and argument to the
11 local US Attorney's Office? Is it your position that The Court
12 lacks authority to impose that deadline?

13 MS. GROOVER: It is, Your Honor, but, again, recognize
14 that there have been courts that disagree with that.

15 THE COURT: If The Court does lack authority for those
16 first two deadlines but has the authority to, as you conceded,
17 to order the Government to file a notice by a certain date, do
18 you have a position in this case as to The Court's authority in
19 this case?

20 MS. GROOVER: The Government is in a position now to
21 make our recommendation to the Attorney General, quite frankly,
22 and in candor to The Court, we did not after the motion was
23 filed until there's a ruling on that, so we are in a position to
24 submit that as soon as possible, and then it's the Government's
25 understanding it can take several months for that review process

1 so we would respectfully request at least several months before
2 the death notice must be filed.

3 THE COURT: Did you hear Mr. Ertl's suggestion when I
4 asked him about the deadline for the filing of the death notice
5 that they would be amenable to the corollary, that the
6 Government could not file a notice before a certain date to
7 allow time to conduct an investigation and submit to main
8 Justice. What would the Government's position be on that?

9 MS. GROOVER: We would have no objection to that
10 proceeding.

11 THE COURT: All right, thank you, Ms. Groover.

12 MS. GROOVER: Thank you, Your Honor.

13 THE COURT: Mr. Ertl, any rebuttal?

14 MR. ERTL: Judge, I think -- I think what's important --
15 first of all, I don't think the District Court's order staying
16 the proceedings or The Court's order staying the proceedings
17 even substantially complies with 670. I think it was The Court
18 just reiterating a representation that the Government made that
19 it's currently scheduled for July 8th. I don't think it was a
20 deadline either intended or otherwise.

21 I think here, Judge, I think you do have authority to --
22 I think obviously Judiciary, the defender services, and the
23 Department of Justice thought you had authority when they
24 promulgated Section 670.

25 I think that the Government, I think -- the Government's

1 right that this is to streamline things, but streamlining this
2 could also -- this case would be considerably streamlined if we
3 were successful in convincing the local US Attorney here that
4 death was not an appropriate punishment in this case.

5 The case would be streamlined. Costs would be saved. I
6 think, as Mr. Stetler said, it's cost effective to do this stuff
7 up front because a trial would be costly for the Government,
8 costly for The Court, costly for the taxpayers.

9 So it's -- it's -- the streamlining is indeed what we're
10 asking to do here. We're asking to say give us an opportunity
11 to present to you a meaningful mitigation case, a meaningful
12 presentation, and we can streamline this because I believe we
13 will be able to convince them not to go forward. So I think --
14 something else, it just went out of my head.

15 Thank you.

16 THE COURT: And I do have one additional issue that I
17 want to address that's related to this. There's a pending
18 motion that's filed by Defendant Perez-Bravo. It's Document
19 Number 57, and that was a motion for The Court to order the
20 Government to file a death notice, and I believe that that
21 motion requested that that notice be filed within ten days.

22 Based on the presentations here today, I want to know if
23 that defendant is persisting in that motion or if they withdraw
24 it. It seems inconsistent with the positions taken here on this
25 request for more time by Mr. Ertl. I will give you a moment to

1 confer. Again, that's Document Number 57.

2 MR. MARTIN: That motion was actually filed before I
3 became involved in this case, but I tell you my experience.
4 I've had more than 30 of these cases over the years. No, we
5 don't want that deadline imposed for them to make a notice. I
6 tell you practically why.

7 My experience is if they cannot make their decision by
8 that deadline, they just go ahead and notice the case as a death
9 penalty case and say, "We will reconsider later," and we don't
10 want to be in that posture.

11 We're not insisting on that deadline for the Government
12 to make their decision. What we are agreeing to or supporting
13 is the giving us enough time to put together materials so that
14 they can make a good decision.

15 I will point out, you know, counsel said that she would
16 be -- she's prepared to submit these things already to the
17 Government, to Washington, but that's -- the protocol requires
18 that any such submission -- excuse me -- to include any
19 submission from the Defense but they don't even have that from
20 at least two of the defendants, so that would be an inadequate
21 presentation to Washington.

22 I mean, that's an important part of this process was to
23 make sure that the Defense has had its opportunity to present
24 matters which the Government is not privy to, indeed does not
25 really have an incentive to find out and so, therefore, they

1 would be making their decision without sufficient information,
2 so that's just my two cents.

3 THE COURT: All right. I understand all that.

4 And to clarify, though, as a matter of housekeeping, I
5 understand the timing of that previous motion asking for the
6 death notice, that was before learned counsel was appointed, and
7 so I want to make clear, is that defendant now withdrawing that
8 motion?

9 MR. MARTIN: Yes, yes.

10 THE COURT: All right. And I understand that Defendant
11 Juan Rangel-Rubio and Defendant Higinio Perez-Bravo joined in
12 the motion that's been presented here today, and I just want to
13 open up the floor to their counsel for any other comments that
14 need to be added to make sure everyone has had an opportunity to
15 present or speak. Is there anything further from those
16 defendants?

17 MR. MARTIN: On behalf of the Perez-Bravo, we are
18 satisfied with the presentation put on by cocounsel.

19 THE COURT: I'm going to take this matter under
20 advisement. I will issue a written order with my conclusions
21 and findings.

22 That will conclude the proceedings in this case. We
23 will take ten minutes and reconvene for our next case.

24 MS. GROOVER: Your Honor, if I may, may I make a
25 clarification? Just wanted -- I apologize.

1 THE COURT: You may.

2 MS. GROOVER: Thank you, Your Honor. I just want to
3 make sure I did not misspeak. The local -- our US Attorney
4 office, we have our material gathered and we are prepared to
5 begin that confidential process up to the review committee, but
6 we have -- and I want to make sure I didn't misspeak. That is a
7 confidential process. The recommendation officially has not
8 been made, but we are prepared to make that as soon as The Court
9 authorizes.

10 THE COURT: That was my understanding from your previous
11 representation. You are marshalled together and ready to go but
12 you've not taken the next step. Thank you for that
13 clarification.

14 MR. MARTIN: Can I ask you one question? We filed on
15 Friday an ex parte motion regarding a discovery attorney, and I
16 don't know if you want to hear from us any more about that today
17 since we are all here.

18 THE COURT: I'm not going to take up that matter here
19 today.

20 MR. MARTIN: Fine. Just remind you of one thing, we're
21 not asking for a dime from this Court.

22 THE COURT: Thank you. Anything further?

23 (Proceeding concluded at 1:43 p.m.)

24 | CERTIFICATION

25

1 I certify that the foregoing is a true and correct
2 transcript of the stenographic record of the above-mentioned
3 matter.

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11/14/2019

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Debra Gilbert, Court Reporter

Date

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